IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

GIUSEPPE BOZZO FU LORENZO, as owner of the STEAM VESSEL ANTOINETTA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. .....

A. T. ROSASCO, as owner of the STEAM VESSEL SANTA ROSA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. .....

MARIANO MARESCA AND COMPANY, as owner of the STEAM VESSEL MAR GLAUCO, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. .....

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, as owner of the STEAM VESSEL BELVEDERE, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

BRIEF IN SUPPORT OF PETITION

A

Introductory Statements

1

Report of Opinions Below

The opinion of the Court of Appeals, announcing its decision of affirmance, is reported in 153 F. 2d 138. No opinion was delivered by it on its denial of the petition for a rehearing.

The opinion of the District Court is reported in 49 F. Supp. 148.

2

Basis of Jurisdiction

The basis of this Court's jurisdiction is set forth in the Petition (*supra,* 17).

3

Specifications of Error

Petitioner's * specifications of error are set out in the Petition (*supra,* 20-38).

B

Argument

Summary of Argument

Petitioner was entitled under the guaranties of due process to defend his property when assailed, as it here was, in court (Const., 5th Am'd't.; *McVeigh* v. *United*

* The term "petitioner" as used herein, refers to the petitioner Giuseppe Bozzo fu Lorenzo, not only for himself, but as typical and representative of the other petitioners respectively in the other above-entitled causes, on behalf of all of whom this brief is submitted.

States, 11 Wall. 259; *Windsor* v. *McVeigh,* 93 U. S. 274, 278; *Watts, Watts & Co.* v. *Unione Austriaca, etc.,* 248 U. S. 9, 22). This right he was denied, though he had been cited to appear and defend, his appearance and proffered defense were rejected and himself driven from court and adjudged and decreed to be without any property right in the *res* he had sought to defend as his own.

The theory upon which the lower courts proceeded was (1) that a claimant's right to a trial of his defense of title to a *res* against the Federal Government's asserted forfeiture title does not survive a valid determination by the court adverse to his title; (2) that here the court had made a determination adverse to his title by finding that the same either had been forfeited for crime on March 30, 1941, or had been captured for enemy ownership on July 22, 1942; (3) that, therefore, petitioner here had no right to a trial of his defense of title.

The prime trouble with that reasoning is that, in making the determination referred to in the second premise, the court assumed that it *could validly* make, and *had validly* made, such determination *without a trial.* The court thus begged the whole question, by assuming the very thing to be proved. Its reasoning amounted to no more than this: Petitioner was entitled to no trial of his defense of title, because *without a trial* the court had found he had no title to defend.

Petitioner was entitled to a trial of his defense of title to the *res* against both adverse claims asserted in court, that of forfeiture for crime and that of capture for enemy ownership, (cases cited, *supra,* 48-49). But neither claim could be tried save at the appropriate time. If the court had jurisdiction, the time was appropriate for the trial of the asserted forfeiture title. But there could be no appropriate time for trial of the claim of title by capture

until, in any event, the claim of title by forfeiture was out of the way (*The Sally,* 8 Cranch. 382, 384; *The Hampton,* 5 Wall. 372, 376). For the two claims were utterly inconsistent and could not be asserted at one and the same time: One and the same party could not at once occupy the two irreconcilable positions (*Flanigan* v. *Turner,* 66 U. S. 491; *Scholey* v. *Rew,* 23 Wall. 331, 351; *Railway Co.* v. *McCarthy,* 96 U. S. 258, 267-268; *Hopkins* v. *Grimshaw,* 165 U. S. 342, 357; *Pease* v. *Rathbun-Jones Eng. Co.,* 243 U. S. 273, 277; *Norfolk Southern R. R. Co.* v. *Chatman,* 244 U. S. 276, 281-282); nor pursue the two irreconcilable remedies (*Van Winkle* v. *Crowell,* 146 U. S. 42, 50-51; *Robb* v. *Vos,* 155 U. S. 13, 41-43; *Stuart* v. *Hayden,* 169 U. S. 1, 15; and *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, 294-295). Here, the only event in which the claim of title by forfeiture could be out of the way prior to its trial, was the District Court's want of jurisdiction over that claim. The District Court *was* without jurisdiction over that claim (cases cited *infra,* 111-126). The court was, therefore, at once in a position to pass upon the claim of title by capture.

That claim of title by capture was bad on the face of the record for several reasons, viz.: (1) It was bad on the face of the record because that showed that petitioner's property in the "Antoinetta" had from and after a time anterior to the outbreak of war been engaged, and at the time of the alleged capture was still engaged in lawful trade not with private American citizens under the revocable permission of a license, but, instead, with the United States Government under the irrevocable permission of a vested contract right authorized by Congress and concluded with the sovereign United States itself, whereunder the petitioner's property was to be respected and restored, either in kind or in value, at the conclusion of

the contract service, together with hire for its use in the meantime; that the Trading with the Enemy Act (*supra*, 10 n.) was in no event applicable, since that Act was designed to cover property engaged or held in *private* trade by *private citizens*, not that engaged or held under public contractual relations between the American sovereign and its enemy owner (S. Repts. Nos. 111, 113, pp. 1, 10-11, 15, 16, 18, 19, 65th Cong., 1st Sess.); and that, if applicable, that Act by necessary implication granted immunity to enemy property engaged in such public intercourse and under such a sovereign contract. (2) It was bad on the face of the record because that showed that the only property petitioner possessed in the *res* at the time of the alleged capture consisted in and of the sovereign contractual obligation or debt of the United States to restore the vessel, in kind or value, to petitioner at the close of the requisition service with just charter hire for its use in the meantime (R. 23a; Const., 5th Am'd't.; Act of June 6, 1941, *supra*, 6 n.): And it was not in the statutory or constitutional power of the Federal Government to capture the sovereign's own contractual obligation or debt, for to attempt such a thing was nothing more nor less than to attempt its repudiation; which was forbidden, not only because Congress *could not* authorize it (Const., 14th Am'd't., sec. 4; *Perry* v. *United States*, 294 U. S. 330, 352, 353, 379-380), but also because Congress *had not* authorized it even in the Act relied on by the would-be captor (Trading with the Enemy Act, *supra*, 10 n.; authorities cited *infra*, 71-99). (3) It was bad on the face of the record because that showed the vessel *res* to be a deposit which was accepted on the public faith by the Federal Government from petitioner in peace-time and to the return of which, in kind or value, with hire for its use in the meantime, the public faith was plighted; and

that, therefore, despite the ensuing war, it was immune to capture, as was that public faith to repudiation (Const., 14th Am'd't, sec. 4; *Perry* v. *United States, supra;* authorities cited *infra,* 84-90). (4) It was bad on the face of the record because that showed that the alleged captor had found no property in the *res* that was subject to capture and, instead, left to the court the determination whether there was any such (R. 28a, 30a; *Stoehr* v. *Wallace,* 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.,* [D. C., S. D. N. Y.], 17 F. 2d 174, 175, 178).

The reasoning of the court, as expounded *supra* (49), also was fallacious in that its first premise,—that is, that petitioner's right to a trial of his defense of title did not survive a determination by the court adverse to his title,—was insupportable unless limited in its terms to the case of a determination by the court (1) that petitioner's title had been lost prior to seizure of the *res* for forfeiture; and (2) that, when so lost, it had carried with it every legally valuable benefit petitioner might thereafter otherwise reap from an adjudication that such seizure was tortious, or at least unsustainable. For, (a), so long as petitioner held title at the time of that seizure, it was he who was thereby damaged and possessed the right to sue the seizor for damages if such seizure was tortious and, therefore, possessed the right to prove such seizure tortious; which could be proved nowhere else than in the trial of the claim of title by forfeiture and not otherwise than by the defeat of that claim (*Gelston* v. *Hoyt,* 3 Wheat. 246, 314; *The Apollon,* 9 Wheat. 362, 367; *United States* v. *422 Casks of Wine,* 1 Pet. 547, 549–550). And, (b), so long as petitioner, despite such loss of title, would, from a defeat of the asserted forfeiture title, reap, by reason of the very fact of his quondam title, a legally valuable benefit, it was his right to seek that defeat and

save that benefit (*The Beaconsfield,* 158 U. S. 303, 307; *Pendleton* v. *Benner Line,* 246 U. S. 353, 356; *The Kaiser Wilhelm II* [C. C. A., 3rd Cir.], 246 Fed. 786, 789; *Queenan* v. *Mays* [C. C. A., 10th Cir.], 90 F. 2d 525, 534-535; *The Regina del Mare,* Br. & L. 315, 316; *Chipman* v. *City of Hartford,* 21 Conn. 488, 498). And such a benefit petitioner, if he succeeded in defeating the asserted forfeiture title, was in a position here to preserve, viz., the continued trusteeship of the alleged captor of the *res* for the benefit of petitioner's American creditors and, to the extent their claims were so satisfied, his freedom from any and all further personal liability therefor (Trading with the Enemy Act, sec. 9(a), *supra,* 11n.; *White* v. *Mechanics Securities Corp.,* 269 U. S. 283, 301; *Markham* v. *Cabell* (U. S. Sup. Ct.), Adv. Op. No. 76, Dec. 14, 1945).

The Alien Property Custodian in no event had any right to succeed to the defense of petitioner's claim of title because the former was but an agent of the libellant, and to permit him to defend was but to permit the libellant to defend against libellant's own suit (*Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 603; *Becker Co.* v. *Cummings,* 296 U. S. 74, 78; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118). Such identity of interest must at once destroy the court's jurisdiction to try the cause, at least as against petitioner's property therein (*Lord* v. *Veazie,* 8 How. 251; *Cleveland* v. *Chamberlain,* 66 U. S. 419; *Wood-Paper Co.* v. *Heft,* 8 Wall. 333; *Globe & Rutgers Fire Ins. Co.* v. *Hines* [C. C. A., 2d Cir.], 273 Fed. 774, 777, 778).

The Circuit Court, apparently conceding as much, nevertheless held that such loss of jurisdiction to try libellant's asserted forfeiture title to petitioner's property in the *res,* would still leave at least *some* controversy within the court's jurisdiction, viz., such controversy as

might develop between third-person mortgage, maritime, attachment and stipulation lien-holders, *if any,* on the one hand, and libellant on the other. But herein the court erred: For (1) the statute (Act of June 15, 1917, Title II, sec. 3, *supra,* 4 n.), relied on as authorizing the forfeiture, authorized only the forfeiture of the *res,* not of specific interests therein; (2) it did not authorize the forfeiture of the liens of presumably innocent third persons and the remission of the penalty to the only interest charged with its violation, to-wit, the owning interest; and (3) so to enforce it against the former and withhold its enforcement against the latter, would violate the law giving power of remission to the Secretary of the Treasury alone, and that, too, only on his first finding the absence of the very criminality charged in the libel (Act of June 17, 1930, c. 497, Title IV, secs. 616-618, *supra,* 32 n.). The substitution of libellant in petitioner's role of claimant would defeat the court's jurisdiction, not merely over a part, but over the whole, of the forfeiture cause.

The court's want of jurisdiction to try the Federal Government's asserted forfeiture title, which alone, as pointed out *supra* (49-50), could confer upon it a present jurisdiction to try the Government's asserted captor's title, was due (1) to the libel's alleging, as the statute authorizing forfeiture, one without force or effect at the time of the offense charged in the libel; (2) to the libel's alleging, as the offense giving rise to the alleged forfeiture title, one not made by that statute a ground of forfeiture; (3) to the Government's requisitioning the *res* as petitioner's property, and not its own,—after it had filed its libel on the contrary theory,—and in connection with said requisition, availed itself of a statute designed to destroy the court's jurisdiction and subscribed to terms and conditions inconsistent with the further exercise thereof; and

(4) to its depriving the court of custody of the *res* so requisitioned and thereby destroying the only basis of jurisdiction upon which the court was authorized to proceed with the *in rem* cause.

FIRST POINT

The decree affirmed below, in denying Petitioner the right to continue his defense of title to the Vessel "Antoinetta" against libellant's asserted forfeiture title, striking his appearance and defense, and adjudicating without a trial that he stands without a property right in the *res*, violated his guaranties of due process, was beyond the Court's judicial power and is unsustainable for any purpose.

An alien enemy is entitled to defend his property in court when it is there assailed. That principle of due process has been announced by this Court more than once and with more than ordinary emphasis. In reversing a default decree pronouncing against the title of one who had appeared and sought to defend, as his own, property libelled as forfeit to the Federal Government, but whose appearance and defense had been stricken on the Government's motion because of his being an alien enemy, this Court, speaking by Mr. Justice Swayne, said in *McVeigh* v. *United States,* 11 Wall. 259, 267:

> "In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion wil be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence

> could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principle of the social compact and of the right administration of justice."

Such right of defense, it was there pointed out, is not partial or limited, but full and entire.

> "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence."
> (*Id.*, 267).

This principle applies as well in the defense of one's property as of one's person. Thus, in holding worthless a title to property acquired under such a decree of condemnation and sale, this Court, in *Windsor* v. *McVeigh*, 93 U. S. 274, 277, in an opinion delivered by Mr. Justice Field and after quoting from the language of Mr. Justice Swayne first set out above, said:

> "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

To oust, from litigation seeking the condemnation of property in an *in rem* action, one appearing, as petitioner here appeared, in response to a citation, is, this Court there pointed out, tantamount to recalling the citation.

> "That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. * * * But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.
>
> "The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him."
>
> *Id.*, 277-278.

Nor, said this Court, does the fact that the action is *in rem* and that the *res* is still in the court's custody

justify a further exercise of jurisdiction after the citation has been recalled.

> "The position of * * * counsel is, that, as the proceeding for the confiscation of the property, was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however, erroneous, cannot, therefore, be collaterally assailed. * * * But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. * * * The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question *after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges.*" (Emphasis supplied.)
>
> *Id.*, 278-279.

In *Watts, Watts & Co.* v. *Unione Austriaca, etc.*, 248 U. S. 9, 22, this Court said it was a matter "of course" that an alien enemy is "entitled to defend before a judgment should be entered."

The right has now been expressly declared by Congress in the Trading with the Enemy Act (sec. 7b, *supra*, 10 n.), whose declaration "that an enemy * * * may defend by counsel any suit or action at law which may be brought against him", is but a reaffirmation of the doctrine expounded in *McVeigh* v. *United States, supra*, and *Windsor* v. *McVeigh, supra*, (S. Repts. Nos. 111 and 113, pp. 21, 24, 65th Cong., 1st sess.; *Ex parte Colonna*, 314 U. S. 510, 511). And this Court, in so indicating, in *Ex parte Colonna, supra*, cited, among other cases, *Porter* v. *Freudenberg* [1915], 1 K. B. 857, where the British

Court of Appeal, in following *McVeigh* v. *United States, supra,* and upholding an alien enemy's right to defend against adverse litigation and appeal from adverse judgment, said (883-884):

> "Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of Justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.
>
> Equally it seems to result that, when sued, if judgment proceed against him, the appellate Courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate Court by giving the notice of appeal, which is the first necessary step to bring the case before that Court; but he is entitled to have his case decided according to law, and if the judge in one of the King's Courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate Court to have the error rectified. *Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant.* The decision in *McVeigh* v. *United States* (*supra*) in the Supreme Court of the United States is to the same effect. In that case the defendant, who was appellant in the circumstances already stated, brought writ of error in respect of the judgment of the District and Circuit Courts and succeeded in reversing the judgments of those Courts" (Emphasis supplied).

Here the District Court did, and the Circuit Court of Appeals sanctioned its doing, what this Court had condemned in *McVeigh* v. *United States, supra,* and *Windsor* v. *McVeigh, supra.* Though purporting to recognize and respect the alien enemy's right of defense while it remained uncaptured, they nevertheless held that under the law the Government, the libellant, could capture that right of defense and thus nullify it altogether; that the Government could take in two steps what this Court, in the cases cited, had condemned when taken in one.

a

The lower courts arbitrarily denied petitioner the right of defense guaranteed him by law.

The lower courts did not avowedly question the soundness and authority of those decisions and that law (Const., 5th Am'd't.; Trading with the Enemy Act, sec. 7 (b), *supra,* 10 n.), but held, in substance, that the principle of right they declared could be rendered inoperative at executive will and by executive action. The District Court, in espousing that doctrine, pointed to *Ex parte Kumezo Kawato,* 317 U. S. 69, as its parent; and this, because of certain language appearing therein. The District Court said, in its analysis of that opinion, that this Court had "significantly" there "declared that the rights of even resident enemy aliens may be abrogated" by "administrative or legislative action" (R. 54a). And so, the District Court concluded the executive or Congress might all the more appropriately so abrogate the rights of non-resident alien enemies such as is petitioner; and that that is just what the executive did here, viz., "the government, acting through its executive branch under legislative authority, has abrogated the rights of the claimant here * * *" (R. 55a); that is, the claimant's rights of defense.

That reasoning is fallacious because the language of this Court in the *Kawato* case, so invoked, referred at most, as the context plainly shows, to the "rights" of *suit* of resident aliens of enemy nationality; in *no* respect to their rights of *defense* when they themselves or their property was the object of suit. This Court there simply pointed out that it was within the executive power to place such residents in the category of non-resident alien enemies and thus deprive them of their *right to sue* in our courts; not that the executive had the power to take away from either class their *right to defend.*

Petitioner's right of defense represented to the District Court a mere "chose in action". And so, it concluded, since this Court had "significantly" in *United States* v. *Chemical Foundation,* 272 U. S. 1, "upheld the right of the Custodian to seize and to sell 'choses in action' " (R. 56a), he might here do the same with petitioner's right of defense. Said the Court (R. 56a):

> "In the instant case, in the final analysis, the substance of the dispute between the claimant and the Custodian is the claimant's assertion of his property interest in a *chose in action—a right to defend* * * *" (Emphasis supplied);

and therefore concluded that *United States* v. *Chemical Foundation supra,* along with *Cummings* v. *Deutsche Bank supra,* was

> "dispositive of the issue involved in the case at bar" (R. 57a).

The Circuit Court of Appeals did not expressly undertake to uphold the power of the executive department thus *directly* to set at naught the law guaranteeing the alien enemy's right of defense. But neither did it chal-

lenge the District Court's assertion that such power *did in fact* exist.

And that the executive department might exercise such power *indirectly,* through the device of "capture", neither court had any doubt. In this, they accepted the following argument of Government counsel, viz.: That it is not in *every* case that the property which an alien enemy is engaged in defending in our courts as his own, is captured by the Custodian; that in *some* cases the Custodian still permits the alien enemy to retain his property; that in *such* cases, *but such only,* the alien enemy retains his right of defense; and that, therefore, the cases, the Fifth Amendment and the saving clause of the statute are *not altogether* dead letters, although the Custodian *has* it in his power to render them such in *every case,* by the simple device of "capturing" that which is defended.

But the trouble with that line of reasoning is that it forgets that, to defeat the right of defense in such case, the captor must come into court and pursue a judicial remedy for the affirmative relief he seeks, viz., the ousting of the alien enemy; must predicate his right to such judicial relief on his alleged captor's title; and, before establishing his right to such judicial relief, must prove the validity of his title. And the court, thus, in an *in rem* action, where the original issue is one of title, so far from being relieved—by the alleged captor's intervention—of the necessity of trying the defender's claim of title against that of the libellant, is but burdened with the additional necessity of now trying also the defender's claim of title against that of the alleged captor; and, where libellant and the alleged captor are different entities, their conflicting claims of title *inter sese* as well (*The Sally,* 8 Cranch. 382, 384). But where, as here, the libellant and the alleged captor are one and the same party, and the

former's asserted title is wholly inconsistent with the latter's, the latter's claim of title cannot even be offered or heard; at least, until the former's is out of the way (*The Hampton*, 5 Wall. 372, 376).

The line of reasoning counsel thus induced the lower courts to take to the contrary effect,—that is, that intervention by capture relieved the courts of the necessity of trying petitioner's defense of title at all,—amounted to a simple begging of the question; and to a denial out of hand, of petitioner's right of defense,—without a reason and in violation of the decided cases and their law as declared in the Fifth Amendment and the Trading with the Enemy Act (*supra*, 10 n.).

Thus, the reasoning of the lower courts was as follows: An alien enemy is not entitled to a trial of his defense of title to a *res*, against the Government's asserted ownership thereof by forfeiture, after the court determines he has no title to defend; the court has here determined, without a trial, that petitioner, an alien enemy, has no title to defend, because it has determined, without a trial, that he lost the same either by forfeiture for crime on March 30, 1941, or by capture for enemy ownership on July 22, 1942; therefore, petitioner is not entitled to a trial of his defense of title.

But, as will at once be seen, this reasoning leads nowhere, because the second premise assumes the truth of the conclusion, the thing to be proved. In assuming that the Court *may validly* determine and that the Court *has validly* determined *without a trial* the absence of title in petitioner, it has assumed that petitioner is in no event entitled to a trial of his defense of title. And the whole of the so-called reasoning amounts to no more than saying that petitioner, an alien enemy, has no right to a trial of his defense of title simply because the Court has

said so. And that is nothing but an arbitrary denial of the due process this Court, the Fifth Amendment and the Trading with the Enemy Act have declared petitioner shall have.

b

It was not open to Government to offer, nor to court to hear, the former's assertion of title by capture for enemy ownership, at least until its assertion of title by forfeiture for crime was out of the way.

The libel claim of title by forfeiture, for crime, if ultimately made good, placed petitioner's whole title in the Government not later than March 30, 1941 (*Gelston* v. *Hoyt*, 3 Wheat. 246, 311; *Henderson's Distilled Spirits*, 14 Wall. 44, 57; *United States* v. *Stowell*, 133 U. S. 1, 16; *The Annandale*, (C.A.), 2 P.D. 218, 220, aff'g. 2 P.D. 179, 185). And its capture by the same Government thereafter on July 22, 1942, would, in that event, have been an impossibility. Therefore, at least while the Government presses its original claim of title by forfeiture for crime as of March 30, 1941, it cannot be heard to press the contrary claim of subsequently acquired title by capture for enemy ownership as of July 22, 1942, or to aid the judicial establishment of the first by the assertion of any right predicated upon the second (*The Sally*, 8 Cranch. 382, 384; *The Hampton*, 5 Wall. 372, 376).

The Government's reliance upon the first position estops it from profiting, at least at the same time, from the second (*Scholey* v. *Rew*, 23 Wall. 331, 351; *Flanigan* v. *Turner*, 66 U. S. 491; *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267-268; *Hopkins* v. *Grimshaw*, 165 U. S. 342, 357; *Pease* v. *Rathbun-Jones Eng. Co.*, 243 U. S. 273, 277; *Norfolk Southern R. R. Co.* v. *Chatman*, 244 U. S. 276, 281-282).

Its pursuit of the *res* as forfeited to it in 1941, estops it from pursuing, at least concurrently, the same *res* as captured by it in 1942 (*Van Winkle* v. *Crowell,* 146 U. S. 42, 50-51; *Robb* v. *Vos,* 155 U. S. 13, 41-43; *Stuart* v. *Hayden,* 169 U. S. 1, 15; and *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, 294-295).

c

The lower courts arbitrarily and without right denied petitioner a trial of his defense against the Government's claim of title by capture.

The appropriate time for a trial of the claim of title by capture could at best occur, as shown *supra* (64), only after the conflicting claim of title by forfeiture was out of the way.

But if, as petitioner argued below and argues here (*infra,* 111-126), the District Court was already without jurisdiction over the cause of title by forfeiture, the cause of title by capture (if its assertion here was at all open to the Government) was presently ripe for consideration. Petitioner denied that asserted title by capture and undertook to defend against it. This claimed right of defense, however, the lower courts refused, saying in effect that they could not question, nor petitioner dispute, the alleged title by capture. For this position the Court of Appeals mistakenly relied upon *Hirabayashi* v. *United States,* 320 U. S. 81, which decided at most that the exercise of judgment or discretion within a clear congressional grant of constitutional power cannot be questioned judicially; not that the legislative grant or its constitutionality is not open to inquiry. In precluding petitioner from disputing here the existence and constitutionality of such a grant of power, the lower courts

violated his guaranties of due process quite as much—and for the same reasons—as they transgressed them in denying his claimed right of defense against the asserted title by forfeiture (*Fed. Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649). The validity of petitioner's defense against the claim of title by capture appears from the following Point.

SECOND POINT

The Government's claim of title by capture was unsustainable on the face of the record.

The face of the record showed the Government's claim of title to petitioner's property by capture to be without merit.

Petitioner's sole property in the *res*, at the time of the alleged capture of that property, was engaged in public intercourse with the sovereign United States itself under the terms of a contract authorized by an act of the Congress of the United States (Idle Foreign Vessels Act of June 6, 1941, *supra*, 6 n.). The Trading with the Enemy Act of October 6, 1917, *supra*, was therefore not applicable; but, even if so, that Act by necessary implication granted to that property, so engaged in that public intercourse, immunity to capture.

a

The Trading with the Enemy Act was without application either to petitioner's property or to the public contract whereunder it was possessed and operated by the American sovereign.

The Custodian had at most no more of the power of capture conferred upon the Congress by the Constitution (Art. 1, sec. 8, cl. 11; *Brown* v. *United States*, 8 Cranch

110, 126; *Miller* v. *United States,* 11 Wall. 268, 305; *Stoehr* v. *Wallace,* 255 U. S. 239, 241-242) than that which the Congress had conferred upon the President in the Trading with the Enemy Act as amended (*supra,* 10 n.).

That Act was meant to curb the *citizens* in *their* dealings with enemies and enemy property; *not* to curb the *sovereign* in *his.*

That this must be so is manifest not only from the face of the Act, but from the avowed purpose for which it was adopted. It nowhere purports to authorize the capture of enemy property possessed and operated by the sovereign in his public business under a contract between him and private enemy owner. Indeed every "person" prohibited from doing the things proscribed by the Act is by its own terms defined so as expressly to exclude reference to the sovereign (sec. 2, *supra; United States* v. *Cooper Corp.,* 312 U. S. 600, 604, 606, 607; *United States* v. *Securities Corporation General* [C.A. D.C.], 4 F. 2d 619, 622, affd. in *White* v. *Mechanics Securities Corp.,* 269 U. S. 283).

The avowed purpose of the Act was to adopt, as United States statute law, that rule of the law of nations which interdicted all commercial intercourse between *citizens* of one belligerent and the other; *not* to curb, cripple or control, contrary to the law of nations, the power of the *sovereign* to deal with enemy citizens and their property (S. Repts. Nos. 111, 113, pp. 1, 10-11, 15, 16, 18, 19, 65th Cong., 1st sess.; *The Rapid,* 8 Cranch 155, 161; *Scholefield* v. *Eichelberger,* 7 Pet. 586, 593; *The William Bagaley,* 5 Wall. 377, 405, 407; *Hanger* v. *Abbott,* 6 Wall. 532, 535, 536; *Coppell* v. *Hall,* 7 Wall. 542, 554, 557, 558). That power of the sovereign the Act left not only untrammeled but expressly recognized (Trading with the Enemy Act, sec. 5a, *supra,* 10 n.).

That the rule of the law of nations thus incorporated into our statute law imported a prohibition—of intercourse with

the enemy—*to the citizens, not to the sovereign,* plainly appears from the authorities.

This Court said in *Scholefield* v. *Eichelberger, supra,* 593:

> "The doctrine is not at this day to be questioned; that during a state of hostility *the citizens* of the hostile states are incapable of contracting *with each other* * * * at present it may be safely affirmed that there is no recognized exception but *permission* of a *state* to its *own citizens* * * *." (Emphasis supplied.)

In *The William Bagaley, supra,* 405, this Court said:

> "Public war, duly declared or recognized as such by the war-making power, imports a *prohibition by* the sovereign *to* the *subjects or citizens* of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country." (Emphasis supplied.)

It is, according to the rule, a prohibition from the sovereign to the *subject* that the war imports; *not* a prohibition from the sovereign to *himself.* Under the rule, the sovereign not only may himself still deal with enemy citizens and enemy property, but may authorize his own citizens to do so. Said this Court in *Hanger* v. *Abbott, supra* (535):

> "Upon this principle of public law it is the established rule in all commercial nations, that trading with the enemy, *except under a government license,* subjects the property to confiscation, or to capture and condemnation." (Emphasis supplied.)

That is, when the trade is authorized or conducted by the sovereign, the property involved therein is immune "to confiscation, or to capture and condemnation." Just

as, when the trade is *not* authorized, a non-enemy's property engaged therein takes on the character of *enemy* property (*The Rapid, supra,* 162-163); so, when the trade *is* authorized, an enemy's property engaged therein takes on the character of *non-enemy* property (Trading with the Enemy Act, sec. 7c, *supra,* 10 n.). For as to *all* property engaged in authorized dealings with the enemy,—whether it be owned by the enemy or by non-enemy,—there is a *suspension* of hostilities; for there cannot be at one and the same time for one and the same property "war for arms and peace for commerce." As this Court in *Coppell* v. *Hall, supra,* said (554):

> "The sovereign may license trade, but in so far as it is done, it is a *suspension of war,* and a *return to the condition of peace.* It is said *there cannot be, at the same time, war for arms and peace for commerce.*" (Emphasis supplied.)

Thus, petitioner's property in the "Antoinetta", possessed and operated, as it was, by the American sovereign during the war under a requisition-charter contract concluded between them, was *quoad hoc* the property of a *friend* and *not* the property of an *enemy;* and, hence, no more subject to the terms of the Trading with the Enemy Act or capturable thereunder than would be property of an American citizen taken over and operated by the American sovereign under the terms of a requisition-charter contract.

The case celebrated as providing the first authoritative expression of the law of nations incorporated into the statute law of the United States in the enactment of the Trading with the Enemy Act, is *The Hoop,* 1 C. Rob. 196. The remarks of Sir W. Scott in deciding that case are, therefore, of particular interest. He said in part (198 *et seq.*):

"In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which *all subjects* trading with the public enemy, *unless with the permission of the sovereign,* is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law—'From the nature of war, trade between enemies must cease. Though there be no special prohibition of commercial dealings, still trade is forbidden by the war *ipso facto,* the declaration of war itself is enough,'* etc. He proceeds to observe, that the interests of trade, and the necessity of obtaining certain commodities, have sometimes so far overpowered this rule, that different species of traffick have been permitted. * * * *But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war quoad hoc.* * * *

"By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. *He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war.*"

It thus results that, while petitioner was an enemy in the sense that he was during the war a resident of Italy, he was not so as to his property in the "Antoinetta"; as to that, at all times during the war, he was a friend, and his property therein, the property of a friend. Hence, insofar as the "Antoinetta" and his property therein were concerned, the Trading with the Enemy Act was wholly without application; and any attempted capture thereunder of that property, wholly unsustainable.

* Translation of Bynkershoek's Latin as quoted by Sir W. Scott.

b

The Trading with the Enemy Act by necessary implication denied to Government a right to capture petitioner's property.

By Section 7(c) of that Act property of an enemy alien holding a license from the President and engaged in trade with a private American citizen is expressly saved and excepted from the Custodian's power of capture. Such exception would doubtless be implied in any event; else the President's license to enter, would be no better than the spider's to the fly.

But the grant of immunity to capture, whether express or implied, in the case of enemy property operated here by license, creates by necessary implication at least as great an immunity in the case of enemy property operated here by invitation of the American sovereign or in performance of a contract with the American sovereign. For license, which itself may be implied as well as express (*McKee* v. *Gratz,* 260 U. S. 127, 136), is a necessary ingredient of invitation or contract. To the itinerant peddler or book agent, it may have to be expressed; not so, to the gardener or maid. He who lures or induces—not to say, compels—another to trust person or property to his control or possession, owes more of an obligation thereto than he would to the person or property of a mere licensee (*Bennett* v. *Railroad Company,* 102 U. S. 577, 580; *N. Y. Central R. Co.* v. *The Talisman,* 288 U. S. 239, 241-242; *Travelers Assn.* v. *Prinsen,* 291 U. S. 576, 581). That which, when confined to license, is mere permission (*Gibbons* v. *Ogden,* 9 Wheat. 1, 213) and revocable at will (*De Harov* v. *United States,* 5 Wall. 599, 627), becomes, when coupled with invitation or contract, an irrevocable obligation.

It must then follow by necessary implication that the Act itself meant to, and did, make immune from capture the property of an alien enemy engaged in trade not with private citizens under a mere license revocable at will, but in trade with the sovereign United States itself, under a contract authorized by Congress and creative not of mere permission, but of vested right.

That, on the face of the record, petitioner had such a vested right in respect to the "Antoinetta" and its operation under requisition-charter, seems clear. While the Governments of the United States and Italy were still at peace, petitioner's vessel had been taken by the United States to be used by the United States for the national purposes of the United States. That alone would have raised by necessary implication under the Constitution (Fifth Amendment)* a contractual obligation or debt running from the sovereign United States to petitioner, even apart from the express terms of the Act of June 6, 1941 (*Phelps* v. *United States,* 274 U. S. 341, 343; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489; *United States* v. *Pink,* 315 U. S. 203, 228). But the Act of June 6, 1941, authorizing the taking that occurred here, expressed what otherwise would thus have been implied, and declared (*supra,* 6 n.) that "just compensation shall be determined and made to the owner * * * of any such vessel"; and further declared, through incorporation of section 902 of the Merchant Marine Act of 1936 (*supra,* 7 n.), that

> "such property shall be restored to the owner in a condition at least as good as when taken less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition."

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* "* * * nor shall private property be taken for public use, without just compensation."

And, in like manner (*supra*, 7 n.) it declared that the Maritime Commission

> "at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property, and for the services required under the terms of such charter."

And it further so declared that, in the event the owner of such vessel deemed the rate of hire so provided in the charter to be less than just compensation for such charter service, he might accept 75 per centum of the rate named in the charter and sue for the balance; that

> "such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use."

And, in the event of loss or damage to the vessel, "due to operation of a risk assumed by the United States under the terms of a charter," it likewise declared (*supra*, 7 n.),

> "the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage."

And, finally and in the same manner, it declared (*supra*, 7 n.) that, in respect to any and all just compensation so payable in respect to the vessel so taken or her use so availed of,

> "the just compensation • • • shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by" the Tucker Act, March 3, 1887, c. 359, 24 Stat. 505, as amended (28 U.S.C.A., secs. 41 (20), 250).

The Act of June 6, 1941, thus explicitly defined the character of the contractual obligation or debt the sovereign United States assumed toward petitioner on and in consideration of its taking over his vessel "Antoinetta" on September 29, 1941, under the terms of the requisition charter thereafter to be executed.

Nor does the fact that that charter has not yet been tendered to petitioner for execution and was compelled by requisition, alter the essential nature of the transaction (*Elliott Steam Tug Co.* v. *Admiralty Commissioners*, [H.L.], [1921] 1 A.C. 137, 141, 143, 145).

Continued performance of that charter by the Maritime Commission, as the agent of the President, on the outbreak of war between Italy and the United States constituted trade with the enemy as defined by the Trading with the Enemy Act.

> "The words 'to trade', as used herein, shall be deemed to mean—

"c. Enter into, carry on, complete, or perform any contract, agreement, or obligation."

Trading with the Enemy Act, sec. 2 (*supra,* 10 n.).

But such trade was expressly authorized not only by Congress but by the President as well. It was he himself that was conducting it through the Maritime Commission and later through its successor, the War Shipping Administration.

The "Antoinetta", whose requisition charter he had authorized the Maritime Commission to enter into by Executive Order 8771 on June 6, 1941 (*supra,* 12 n.), he authorized the Administrator of the War Shipping Administration, following the outbreak of war, to continue to operate thereunder (Executive Order, No. 9054, of February 7, 1942).*

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* This Executive Order, as here pertinent, read as follows:

"By virtue of the authority vested in me by the Constitution and Statutes of the United States, including the First War Powers Act, 1941, approved December 18, 1941, as President of the United States and Commander in Chief of the Army and Navy, and in order to insure the most effective utilization of the shipping of the United States for the successful prosecution of the war, it is hereby ordered:

1. That there is established within the office for Emergency Management of the Executive Office of the President a War Shipping Administration under the direction of an Administrator who shall be appointed by and responsible to the President.

2. The Administrator shall perform the following functions and duties:

"(a) Control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and transports owned by the Army and Navy; and (2) vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation.

* * * * *

"3. The functions, duties, and powers conferred by law upon the United States Maritime Commission with respect to the operation, purchase, charter, insurance, repair, maintenance, and requisition of vessels, and the issuance of warrants with respect thereto, under the Merchant Marine Act of 1936, as amended, 49 Stat. 1985; Public Law 101, Seventy-seventh Congress, approved June 6, 1941, Public Law 173, Seventy-seventh Congress, approved July 14, 1941, are hereby transferred to the Administrator; and such part of existing personnel of the United States Maritime Commission together with such records and public property as the Administrator may deem necessary to the full exercise of his functions and duties prescribed by this Order are hereby assigned to the War Shipping Administration."

In the former Executive Order the President, it will be recalled, had unconditionally "directed" the Maritime Commission, as a matter of duty, not discretion,

> "to determine and make to the owner or owners of any vessel taken in accordance with the provisions hereof, just compensation for such vessel, or the use thereof, in accordance with the provisions of the aforesaid act" (Act of June 6, 1941; *supra,* 13 n.).

And in the later Executive Order (No. 9054, *supra,* 75) that was one of the "duties" thereby "transferred to the Administrator" (*id.,* sec. 3, *supra,* 75).

This later Executive Order thus authorized the continued performance of the requisition charter of the "Antoinetta" in war-time; approved of that transaction of trade with petitioner, an alien enemy, and his property in the Antoinetta,—and not merely authorized but unconditionally required that just compensation be determined and paid to petitioner for such use of his said property.

And that Congress approved of the President's carrying out in war-time the requisition charter of the Antoinetta entered into in peace-time, and sanctioned the Presidential approval thus bestowed upon the transaction of trade with petitioner and his property in that vessel, is made manifest by Congress' subsequently extending the Act of June 6, 1941 (*supra*), to a time six months following the end of the war, in the Joint Resolution of June 16, 1942, c. 416 (56 Stat. 370),* and thereafter amending

* "* * * the provisions of each of the following Acts and resolutions, and all authority thereunder, are hereby continued in full force and effect until six months after the termination of the present war shall have been proclaimed * * *: * * * Public Law 101, Seventy-seventh Congress, approved June 6, 1941; * * * and all authority of the Commission transferred to the Administrator of the War Shipping Administration by the President's Executive Order of February 7, 1942 (numbered 9054; 7 Federal Register 837) shall be performed by such Administrator in conformity with such Executive Order."

it in the Act of March 24, 1943, c. 26, sec. 5 (57 Stat. 49),† both laws expressly referring to and approving of the said Executive Order No. 9054 (*United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152).

It was no mere revocable license, then, under which petitioner's property was being devoted to trade with private citizens; it was a solemn contract authorized by the Congress and availed of by the President, whereunder petitioner's property was being devoted to trade with the sovereign United States itself.

Yet the permission of a mere revocable license under the terms of the Trading with the Enemy Act, would have conferred immunity to capture. How much more so, then, must that same act be understood to confer such immunity upon petitioner's property, covered, as it was, by the permission of an irrevocable license, a contract creative of vested right!

If it be said that the Custodian here found no license, the answer is that the law left him no room for such a finding. The law had inscribed in public view, for all to see, not only the permission of an irrevocable license, but the obligation of a sovereign contract. To undertake a finding to the contrary was but to disobey the law.

Prior authorized and valid agreements of sovereigns to respect and restore private property, always have been construed as rendering such property immune to capture.

In *Thorshaven and its Dependencies*, Edwards 102, in the trial of a libel to condemn, as captured prize, property of Danish enemies, including the property of private

† "* * * the authority conferred upon the United States Maritime Commission by any provision of this Act shall be vested in and exercised by the Administrator of the War Shipping Administration in conformity with the Executive Order of February 7, 1942 (numbered 9054; 7 F. R. 837), as heretofore or hereafter amended."

subjects, the libel was dismissed because it appeared that the property had been originally received by the Crown under an agreement that all private property should be respected, thus rendering it immune to later capture. In passing judgment, Sir W. Scott said (111):

> "I conceive that nothing can be more clear, than that if the capitulation was not disavowed by the British Government, it was binding upon the respective parties: it was a stipulation operating on the Danes to give up all public property, and on the British to respect all private property. Suppose that the English Government, without disavowing the capitulation, had sent a force the next day to take possession of the private property in the island, could there have been a more outrageous breach of public faith?"

In *Simon* v. *Miller* (U.S.D.C., N.Y., S.D.), 298 Fed. 520, Judge Learned Hand has held that the Custodian's power of capture cannot prevail against a previous valid agreement of the United States. There a fund of $350,000 had been deposited by the plaintiff in the American Exchange Bank, in New York City, pursuant to an agreement made between him and the Department of Justice of the United States, which agreement was entered into prior to the appointment of an Alien Property Custodian. It was agreed between the Department of Justice and the plaintiff that the sum should not be withdrawn until the end of the war (first World War), except upon the signature of plaintiff and his counsel, and that no part of it should be paid to an alien enemy named Albert, who was asserting a claim thereto. Subsequently, after an Alien Property Custodian had been appointed, that official determined that Albert was an alien enemy and that the plaintiff owed him consid-

erably more than the said deposit of $350,000 and purported to capture it. The plaintiff thereafter sued the Alien Property Custodian for repayment of the said deposit contending that its capture was unauthorized. Judge Hand, in upholding the contention of the plaintiff and requiring the Custodian to restore the deposit, said (522):

> "The deposit arose because the officials of the Department of Justice wished to impound the plaintiff's assets up to the supposed balance due on the account, and to prevent its payment to Albert. Even if it be true that the deposit in fact created a security for some such official as the Custodian, to be later appointed, still it was consensual in its origin, and the United States had no right to secure its possession by capture."

The promise here given was not gratuitous: It was given by command of the statute itself in consideration of the receipt of full value from the vessel-owner. Receipt of the vessel by the Government constituted full performance of everything to be done thereunder by the petitioner and left performance of the Government's promise of restoration and compensation as the only thing remaining to be done on either side. It was in very truth a deposit received by the Government in peace-time from petitioner; and fulfillment of the former's pledge to return the same with compensation, was required by every consideration of honor as well as of law.

Justice revolts at the idea that the American sovereign,—after it had received the deposit from the private Italian vessel-owner and had plighted the public faith to the return thereof with compensation—should be able either to conceive or to gratify a wish to disown and repudiate that obligation, merely because of subsequent war with the other's sovereign.

Such an agreement—for the benefit of a private alien friend, later become enemy from war with his sovereign—was respected and enforced in the first World War when the German ships at a haven of refuge in the Virgin Islands, were received on the acquisition of those islands in or before January, 1917. The ships were, though war with Germany had meanwhile been declared, excepted from the Joint Resolution of May 12, 1917, authorizing the President

> " to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof * * * which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag or was under register of any such nation or any political subdivision or municipality thereof. * * *"

They were captured neither under that Joint Resolution nor under the Trading with the Enemy Act (*supra*, 10 n.) thereafter adopted October 6, 1917. The reason appears from the debates on passage of the Joint Resolution in the House, where Mr. Webb was in active charge of the bill, and where he gave the following explanation:

> "Mr. Mann: Why is the exception made in the case of the Danish West India Islands, or the American Virgin Islands, as they are now properly called?"
>
> * * * * * * *
>
> "Mr. Webb: I understand that our State Department had a special arrangement with the Danish Government.
>
> "Mr. Mann: What is the special arrangment?

"Mr. Webb: That none of these vessels which were at the Virgin Islands should be confiscated or taken."

55 Cong. Rec. 1903.

After some slight further interchange of remarks, Mr. Webb added:

"My recollection is that the agreement between the United States and Denmark in taking over the Virgin Islands provided that all ships that were then in the harbor should remain the property and in the possession of the then owners. That is why this exception is put in. This was agreed upon by our State Department and the Danish Government."

Id. 1903-1904.

The same kind of an agreement was here entered into between the American and Italian governments with respect to the petitioner's right to restoration and compensation. The State Department of the United States assured that of Italy, both during and subsequent to passage of the Act of June 6, 1941, that for Italian vessels requisitioned thereunder, if not already the property of the United States through forfeiture, their Italian owners would receive just compensation as provided by that Act. Mr. Hull so assured the Italian Ambassador on May 15, 1941, after the then proposed legislation had passed the House, saying:

"The right of a Government to requisition for public use private property within its jurisdiction, whether owned by nationals or by aliens, subject to the payment of just compensation, is well settled. • • • The rule with respect to compensation in these cases is safeguarded not only by the Consti-

tution of the United States but by the proposed legislation. * * *"

U. S. Department of State, file 865.85/649, as set out in Hackworth, *Digest of International Law,* Vol. VII, p. 541.

And, again, on August 21, 1941, after the new law had gone into effect, Mr. Hull telegraphed, through the American Embassy in Rome, to the Italian Government

"that proceedings had been instituted in the courts to determine whether the ships should be forfeited because of violations of the Espionage Act of 1917, *adding that if they were not forfeited on this ground the owners would be paid the value of any vessels requisitioned in accord with the provisions of the act of June 6, 1941.* 55 Stat. 242." (Emphasis supplied.)

U. S. Department of State, file 865.85/578, as reported in Hackworth, *Digest of International Law,* Vol. VII, p. 529.

And, as we have before seen, it was on the very day the Act of June 6, 1941 (*supra,* 6 n.), became law that the President in Executive Order No. 8771 (*supra,* 13 n.) imposed upon the Maritime Commission, not as a matter of discretion, but as one of unconditional obligation, the duty of paying compensation for petitioner's property.

"3. The Commission is directed to determine and make to the owner or owners of any vessel taken in accordance with the provisions hereof, just compensation for such vessel, or the use thereof, in accordance with the provisions of the aforesaid act."

Executive Order No. 8771 (*supra*).

Thus the agreement, obligation and debt of the sovereign United States to compensate petitioner for his property,—at least insofar as he owned it at the time of its requisition—was not only embodied in the Act of June 6, 1941, but repeated and confirmed by the President and the Secretary of State in their official conduct relative thereto. That agreement the Government is now bound to respect. And it leaves no room for capture.

c

Even if the Trading with the Enemy Act did not by necessary implication withhold from the Government any and all power to capture petitioner's property, it should be so construed because such capture was not within the purpose of the legislation.

The purpose of the legislation was to cripple the enemy's power of *waging war* and promote our own (*Miller* v. *United States,* 11 Wall. 268, 306; *Miller* v. *Robertson,* 266 U. S. 243, 248; *United States* v. *Chemical Foundation,* 272 U. S. 1, 9-10); not to inflict a post-war punishment upon enemy citizens (*Sutherland* v. *Mayer,* 271 U. S. 272, 289; *Daimler Co.* v. *Continental Tyre, etc. Co.,* [H. L.], [1916] 2 A. C. 307, 347; *Stevenson and Sons* v. *Aktiengesellschaft, etc.* [H. L.], [1918] A. C. 239, 249, 253, 254).

> " 'The prohibition against doing anything for the benefit of an enemy contemplates his benefit *during the war* and *not* the possible advantage he may gain when peace comes.' " (Emphasis supplied.)
>
> *Sutherland* v. *Mayer, supra* (289).

Here the nature of the contract was such that its entire benefit during the war redounded to the United States; none to the petitioner.

d

Even if the Trading with the Enemy Act did not by necessary implication deny Government any and all power to capture petitioner's property, it should be so construed because to construe it otherwise would be to render it to that extent unconstitutional.

Petitioner's property in the "Antoinetta" at the time of its alleged capture consisted solely in and of the contractual obligation or debt of the sovereign United States to restore to him that vessel in kind or value, with charter-hire for its use in the meantime. That undeniable fact was conceded below.

> "We may concede that whatever interest the claimant had in the 'Antoinetta' was an obligation from the United States to him under the Act of June 6, 1941."
>
> (Brief for Custodian, pp. 11-12.)

To attempt to capture that interest, then, was nothing short of an attempt to repudiate a contractual obligation or debt of the sovereign United States.

> "Public debt has been truly defined, *'A property subsisting in the faith of government'*. To confiscate or sequester it is emphatically to rescind the promise given, to revoke the faith plighted. It is impossible to separate the two ideas of a breach of faith, and the confiscation or sequestration of a property subsisting only in the faith of the government by which it is made."
>
> Hamilton's Works [Lodge ed. 1885], Vol. 5, p. 73, [Letters of Camillus, No. 19].

No such power of repudiation,—no such power "to rescind the promise given, to revoke the faith plighted,"—

reposed in the Executive Department of the Government. Congress had never purported to bestow it (Trading with the Enemy Act, *supra,* 10 n.); Congress constitutionally could not bestow it. The Constitution (Fourteenth Amendment, sec. 4) has declared that

> "The validity of the public debt of the United States * * * shall not be questioned."

As this Court in *Perry* v. *United States,* 294 U. S. 330, in holding the grant of such a power of repudiation to be beyond the ambit of congressional authority, said (352):

> "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments."

And, after citing and quoting from *Lynch* v. *United States,* 292 U. S. 571, 576, 580, and the *Sinking-Fund Cases,* 99 U. S. 700, 719, it added (353):

> "The argument in favor of the Joint Resolution, as applied to government bonds, is in substance that the Government cannot by contract restrict the exercise of a sovereign power. *But the right to make binding obligations is a competence attaching to sovereignty.* In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. *Chisholm* v. *Georgia,* 2 Dall. 419, 471; *Penhallow* v. *Doane's Administrators,* 3 Dall. 54, 93; *McCulloch* v. *Maryland,* 4 Wheat. 316, 404, 405; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370. The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. *The Congress cannot invoke the sovereign*

> *power of the people to override their will as thus declared.*" (Emphasis supplied.)

Among the other authorities relied on by this Court, in the foregoing exposition of constitutional doctrine, was the opinion of Alexander Hamilton, communicated to the United States Senate under date of January 20, 1795, (Hamilton's Works, [Lodge ed. 1885], Vol. 3, p. 29), from which this Court quoted as follows (352 n.):

> "'when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. *Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it.*'" (Emphasis supplied.)

When Congress, "as the instrumentality of sovereignty", once authorizes a promise for value received, it thereafter "cannot invoke the sovereign power of the people" to break that promise. All its power to legislate in respect to such promise is exhausted "unless in aid of" it.

The Constitution (Fourteenth Amendment, sec. 4), in commanding that the validity of the public debt shall not be questioned has thus but expressed what it otherwise would necessarily imply. In recognition of that truth in *Perry* v. *United States, supra,* this Court said (354):

> "The Fourteenth Amendment, in its fourth section, explicitly declares: 'The validity of the public

> debt of the United States, authorized by law, • • • shall not be questioned.' While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. We regard it as *confirmatory of a fundamental principle,* which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the Amendment was adopted. *Nor can we perceive any reason for not considering the expression 'the validity of the public debt' as embracing whatever concerns the integrity of the public obligations.*
>
> "We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power." (Emphasis supplied.)

Below, counsel for the Custodian argued that the foregoing views represented the opinion of a minority of the members of this Court and therefore deprived them of the authoritative effect they otherwise must have. But a glance at the report of the case shows otherwise.

That shows that all of the foregoing views commanded the support of at least eight of the Justices. For, in agreement were those Justices who dissented from the majority holding on another and entirely unrelated and narrower ground, viz., that relating to proof of damages (*Id.,* 379-380; *Machen* v. *United States* [C. C. A., 4th Cir.], 87 F. 2d 594, 596, 598).

Counsel for the Custodian also sought below to escape the effect of this Court's decision in *Perry* v. *United States, supra,*—viz., that Congress was without constitutional power to authorize repudiation of the sovereign contractual obligations of the United States incurred for

value received—by arguing that the Court of Claims in *North German Lloyd* v. *United States,* 61 Ct. Cl. 138, cert. den. 270 U. S. 645, had sanctioned repudiation by the Executive Department of a contractual obligation to an alien enemy authorized by the Act of Congress of March 28, 1918 (40 Stat. 459). The argument was that by that statute Congress had authorized, in the midst of the first World War, the taking of an alien enemy's dock property in Hoboken, New Jersey, and the payment to said alien enemy of just compensation therefor; and that the Executive Department, in refusing to pay just compensation after taking over the said property, had been upheld by the Court of Claims.

But a slight consideration of the terms of the statute* and the facts involved shows the fallacy of that argument. The facts were that a New Jersey corporation, an American citizen, owned the fee in the property; the alien enemy, a 999-year leasehold therein. The statute, in providing for the taking and the payment of just compensation, referred only to the American citizen and its interest in the property, making no reference to the alien enemy's leasehold interest therein. Accordingly, the only contract authorized by Congress was with the American citizen; and that contract, the Executive Department carried out. The Executive Department, in taking over the American citizen's property, also at the same time took over the alien enemy's leasehold. But that taking raised no contract by implication, since it was the property of an alien enemy, captured in time

* "The President is authorized to acquire the title to the docks * * * now *owned* by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, *two corporations of the State of New Jersey* * * * If any *such* property shall be taken as aforesaid, the United States shall make just compensation therefor * * *" (Emphasis supplied.)

of war. Hence, the Court of Claims, in denying the alien enemy's claim to just compensation, was upholding the repudiation of no contract of the United States, either express or implied.

Counsel for the Custodian also argued that in certain instances in the first World War, the Custodian had captured United States Government bonds. But such bonds, it appeared and was not denied by counsel, were merely the corpus of trust or other funds in the hands of local holding agents, which were being held for the account and benefit of alien enemies. The private obligations, debts, or engagements of the local holding agents to the alien enemies were of course capturable, and the mere fact that their subject-matter was Government bonds did not make them any less so; any more than would have been the case if the subject matter had been greenbacks, silver certificates, or gold notes. The obligation captured was the private obligation to the alien enemy to hold for his account or deliver to him promises of the United States. There was no capture or repudiation of a promise or contract of the United States already delivered to or made with an alien enemy.

Involved here, is no capture or attempt to capture a private debt or obligation of an American citizen owing to petitioner. The only obligation and debt here involved is that of the sovereign United States, owing directly to petitioner in consideration of a deposit received from him in time of peace under an unconditional, valid, and binding contract, authorized by the Congress; a contract to restore his deposit in kind or value, with hire for its use in the meantime. And it was beyond the power of the Congress, once that contract had been so made,—

come war, come peace,—to authorize its capture, its dishonor, or its repudiation.

Since that is so, even did the language and the purpose of the Trading with the Enemy Act admit of a construction permitting the implication of such an authority, that construction could not properly be adopted. For, as this Court has said:

> "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same. Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. R. Co.* v. *Boone*, 270 U. S. 466, 472; *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346." (Emphasis supplied.)
>
> *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 30.

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Even if the Trading with the Enemy Act did not by necessary implication deny to Government any and all power to capture petitioner's property, it should be so construed because such construction is in keeping with the law of nations.

Another equally well-settled rule of construction in respect to Federal statutes is that, in the absence of provisions clearly indicating an unwillingness further to subscribe to and abide by those rules of international law which have gained general recognition and acceptance among the nations of the earth, the statutes are to be construed in the light of and in conformity to those rules.

This Court in *The Charming Betsy,* 2 Cranch 64, 118, by Marshall, C. J., declared that

> "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains * * *."

And in *The Paquete Habana,* 175 U. S. 677, where fishing vessels were held to be exempt from capture, this Court said (700):

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton* v. *Guyot,* 159 U. S. 113, 163, 164, 214, 215."

In the same connection, this Court quotes from Chancellor Kent as follows (*id.,* 701):

> "Chancellor Kent says: 'In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and

> no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law.' 1 Kent Com. 18."

If there is one principle of the law of nations upon which the authorities are in unanimous agreement, it is the proposition that public debts owed to an enemy, as distinguished from private debts, are not subject to sequestration or confiscation. Professor John Bassett Moore, in his Digest of International Law, Volume VII, pp. 306, 307-308, says:

> "By the testimony of publicists and the practice of nations, the principle is established that the obligation of a state for the payment of its debts is not affected by war even though such debts be held by citizens or subjects of the enemy. * * *"
>
> "With the law of the present day as to private debts, we are not concerned; but, as to the law touching public debts, the current of opinion is unvarying. Vattel, writing in the last century, declared: 'The state *does not so much as touch the sums which it owes to the enemy:* money lent to the public is everywhere exempt from confiscation and seizure.'
>
> "This principle, says Phillimore, 'is one which now may happily be said to have no gainsayers.'
>
> "The act of the King of Prussia, in 1752, in stopping, as an act of reprisal, the payment of interest due by him to English creditors on the Silesian loan is conspicuous not more by reason of its solitariness than by reason of the unanimity with which publicists have disapproved it. The payment of the interest was in fact resumed, but, while the question was still pending, the King of Prussia presented in justification of his course a memorial. To this memorial a famous answer was prepared for the British Government by Sir George

Lee, judge of the prerogative court; Dr. Paul, the advocate-general; Sir Dudley Ryder, and Mr. Murray, afterward Lord Mansfield. In this answer there is the following passage:

"'It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to a private man. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honor, because a prince can not be compelled, like other men, by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that even during the war they suffered no inquiry to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.'"

The learned publicist continues:

"Vattel described the British answer as 'an excellent bit of the law of nations' (un excellent morceau de droit des gens), while Montesquieu pronounced it 'an answer without a rejoinder' (une résponse sans réplique). It is commended by Twiss, by Calvo, and generally by other publicists.

"Says Pradier-Fodéré: 'States can not confiscate to their profit that which they ought themselves to pay to subjects of the enemy, as by seizing the rents of the public debt. How, indeed, can it be admitted that a state may deprive of their due individuals who, under the guarantee of the law and the public faith, have confided to it their capital.'

"Fiore asserts the same principle in almost the same words, and adds: 'All that we could excuse in case of extreme necessity would be the suspension of payments during the war when the want of money rendered that measure indispensable and

> when the state would have no other means less ruinous of providing for the urgent necessity of the war. But even that expedient, which may be excusable if the Government afterwards makes the payments, which were postponed, at the conclusion of peace, would always be disastrous, because it would undermine the base of the economic life of the state—the public credit.' "

Westlake, in discussing the same matter in his work on International Law, (2nd ed. 1913), Vol. 2, Part 2, War, ch. 2, pp. 41-42, says:

> "Neither the principal nor the interest of a state debt can be confiscated or sequestrated because the individuals to whom it is due are enemy subjects."

Hyde, in his treatise on International Law, (1922), Vol. II, sec. 623, p. 241, comments upon the principle as follows:

> "The indebtedness of a State possesses a special quality of indestructibility due to the circumstance that cancellation or sequestration by the debtor would amount to a breach of good faith, and hence a stain upon its own national honor."

And Wildman, in his Institutes of International Law, Vol. II, pp. 10, 11, emphasizes the vast distinction between private and public debts in respect to a government's right of confiscation, saying:

> "The right to confiscate private debts due to an enemy, was laid down by the Supreme Court of the United States in accordance with the opinion of Grotius and Bynkershoek, and was held not to be distinguishable from the right to confiscate corporeal property, since they are respectively contracted and acquired under the faith of the same

> laws. * * * *But public debts due to private persons are not confiscable.* It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men; there is a confidence that this will not be done."

Birkenhead on International Law (6th ed.) 196, says:

> "The rule as to the suspension of contractual relations during a war does not enable a State to repudiate its obligations to enemy subjects in respect to state debts."

And, after referring to the action of Frederick the Great in withholding payment of the interest upon the Silesian loan, the same learned jurist adds that

> "opinions of the operation were so unanimously adverse that the inviolability of the claim of a State's creditor has been treated ever since as beyond dispute."

Scott, in his Collection of Cases on International Law, (1906), sec. 132, p. li, says:

> "Debts of a State due to the Enemy and the Interest thereon are not confiscable."

Taylor on International Public Law, p. 442, treats the subject as follows:

> "A public debt not the subject of reprisal.—A public debt is not the subject of reprisal; it is inviolable, and interest cannot be stopped on it as a means of redress. Frederick II threatened, in 1753, as retaliation for seizure by England of Prussian ships engaged in prohibited trade, to confiscate English interests in a Silesian loan which he had guaranteed; and in opposition to this was presented

> with an admirable memorial of English jurists, penned principally by Murray, afterwards Lord Mansfield. * * * It is now generally conceded, as a matter of policy, if not of principle, that a public debt is secure against reprisals in peace and war."

Woolsey, in his admirable treatise on International Law, (6th ed.), discussing the same rule, observes (198):

> "Finally, as to public debts due to individual subjects of the enemy, * * * 'one description of property is invariably respected during war, namely, the sums due from the state to the enemy'. * * *"

Vattel, treating of the same subject, in his Law of Nations, Book 3, ch. 5, sec. 77, says, as pointed out by Professor Moore, *supra,* that "the State does not even touch debts which it owes to the enemy."

Von Martens' "Precis du droit des Gens" (William Cobbett translation, June, 1802), Book VIII, ch. II, sec. 5, says:

> "Generally speaking, a nation *does not venture to touch* the capitals which the subjects of the enemy may have in its funds, *or that it may otherwise owe to such subjects.*" (Emphasis supplied.)

Twiss, in his Law of Nations, Part 2, "In Time of War," sec. 58, discussing the same rule, observes (112):

> "It is obvious that it would be contrary to natural justice for a State to reap the benefit of a loan, of which it retains possession, and at the same time to refuse to pay the equivalent for that benefit, which it pledged its faith to pay when it accepted the benefit. It is not like the case in which a State has undertaken to grant a favor to the subject of a friendly power, the continued enjoyment of which

> may be reasonably taken to be conditional on the continuance of friendship between the two States."

And Hamilton, speaking of the reply of the English to Frederick II on the Silesian guaranty, said (Works, [Lodge Ed. 1885], Vol. 5, p. 91, [Letters of Camillus, No. 20]:

> "The universal obligation of good faith is here reinforced on a special ground, by the *point of honor;* to confirm the position that money which a sovereign or state owes to private men, is not a proper object of reprisals."

Other distinguished and honored publicists affirming the inviolability of the debts of a state owing to the subjects of an enemy power are Balthazar Ayala, "Three Books on the Law of War," etc., (John Pauley Bate, tr., 1912), Vol. II, Book I, Ch. V, secs. 41, 42, 43, pp. 52, 53; Ch. VI, sec. 1, p. 55; M. Charles Calvo, "Le Droit International," (3rd ed.), Vol. III, Part II, Book VI, sec. 1978, p. 242; Phillimore, "International Law" (2nd ed.), III, pp. 34, 148; Hall, "International Law," (8th ed., 1924), sec. 144, pp. 521, 525; Halleck, "International Law," (1878 ed.), Vol. 2, ch. 21, sec. 8, pp. 102-103; Pradier-Fodéré, "Traité de Droit International Public" (1894), VI, p. 740; and Fiore, "Nouveau Droit International Public" (1886), III, 226, sec. 1392.

In the absence of any expression to the contrary, the Trading with the Enemy Act (*supra*) must be construed in line with this long and firmly established principle of the law of nations (*The Charming Betsy, supra*).

Below, the Custodian's counsel argued that the foregoing principle of the law of nations applied only to a sovereign's promises to repay money lent to him, not to his promises to return other deposits received by him, such as vessels, or to pay money for goods or services

supplied. Not only is there no authority for such a novel distinction, but it is altogether wanting in logic. The same reasons that condemn repudiation in the one case, condemn it equally in the other. In both the sovereign's honor is involved; in both the public faith is plighted; and in both the sovereign has received the valuable consideration that supports the promise. As well argue that the Fifth Amendment raises an obligation of the sovereign to pay for *money* exacted for public purposes, but not for *other* forms of capital taken to the same national use; or that an individual's promise to repay a loan is of a higher and more compelling character than his promise to pay for goods or services purchased.

An argument, similar to that of the Custodian's counsel, was addressed to, but emphatically rejected by, this Court in *The Banks* v. *The Mayor,* 7 Wall. 16. The contention there advanced was that, while a State could not lawfully tax the United States' promises to repay money borrowed by it, it nevertheless had the right to tax the National Government's promises to pay for any other form of property or services received by it. In denying the validity of that argument, this Court said (24):

> "An attempt was made at bar to establish a distinction between the bonds of the government expressed for loans of money and the certificates of indebtedness for which the exemption was claimed. The argument was ingenious, but failed to convince us that such a distinction can be maintained. It may be admitted that these certificates were issued in payment of supplies and in satisfaction of demands of public creditors. But we fail to perceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly to creditors in payment of their

> demands; or that such certificates, issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money."

Of course in olden times when the activities of Governments were much more limited in scope than now, their promises for value received were generally met with only in connection with their borrowing of moneys. And publicists, in referring to sovereign contracts, seldom had occasion to speak of other kinds of promises. But they never, so far as can be discerned from their writings, purported to draw the distinction argued by counsel.

On the contrary, von Martens, the only publicist of note, the Custodian's counsel cited below, denied the existence of any such distinction, saying that the principle of non-violability of a sovereign's debts, applies not only to investments "in its funds," but as well to whatever "it may otherwise owe" (*supra,* 96).

And this Court, in *Perry* v. *United States, supra,* in construing section 4 of the Fourteenth Amendment, providing that "the validity of the public debt of the United States • • • shall not be questioned," said that it could perceive no reason

> "for not considering the expression 'the validity of the public debt' *as embracing whatever concerns the integrity of the public obligations*" (*supra,* 87).

Clearly the contract of the United States to restore petitioner's vessel capital in kind or value with hire for its use, is just as non-violable as would be its promise to repay his money capital, if taken, with hire for *its* use.

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Petitioner's property could in no event be captured until found, and found capturable as enemy property; and such finding was never made.

Exercise of the Custodian's power of capture at best was conditioned on a preliminary finding by him of property that was capturable as enemy property. Thus section 7(c) of the Trading with the Enemy Act (*supra,* 10 n.) limited his power of capture to property that he "after investigation shall determine is so owing, or so belongs or is so held"; that is, "owing or belonging to or held for, by or on account of, or on behalf of, or for the benefit of an enemy." (*Stoehr* v. *Wallace,* 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.* (D. C. S. D. N. Y.), 17 F. 2d 174, 175, 178.)

And section 10 of Executive Order No. 9095, as amended by Executive Order No. 9193 of July 6, 1942 (*supra,* 12 n.), pronounced such finding to be the "final and conclusive" test of his power of capture.

> "For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof *is* the property or interest of a designated *enemy* country or national thereof shall be *final and conclusive* as to the *power* of the Alien Property Custodian *to exercise any* of the power or authority conferred upon me by section 5(b) of the Trading with the Enemy Act, as amended." (Emphasis supplied.)

Here no such finding or determination was ever made by the Custodian. His vesting order (R. 30a) expressly disavowed any finding or claim that any property interest in the "Antoinetta" was in fact enemy property. The

furthest it went in that direction was to assert that, *if* a particular enemy (petitioner) *had* any interest therein, that hypothetical interest was enemy property (R. 28a). Whether the enemy *did* have any such interest in the vessel, the Custodian left it to the courts and to the courts alone to determine. At least, then, until the courts had determined that such hypothetical interest had some reality, his power to capture it was nill.

In *Stoehr* v. *Wallace, supra,* this Court decided that, for the purpose of capture, the prior determination that property *is* affected with an enemy interest, may be made by the Custodian, as well as by the President. Thereby this Court implicitly decided that it *must* be made *before* the power of capture can be exercised. For, if such prior determination was not prerequisite to exercise of the power, it was wholly bootless to decide who might make it.

Citing and following *Stoehr* v. *Wallace, supra,* the Southern District Court in New York, in *Hunter* v. *Central Union Trust Co., supra,* held a vesting order that was in all essential respects like that here relied on by the Custodian—that is, one based on the hypothesis that enemies *might possibly* have an interest in certain property *not* on a *finding* that they *did* have (175)—to be wholly invalid as a capture, or basis of capture of anything. Said District Judge Goddard (178):

> "before such a seizure takes place, there must be an administrative determination that certain specific property is owned by or held for the benefit of a person or firm who is determined to be an enemy or ally of an enemy. I think it is clear, from the statutes and from the cases construing them, that such determinations are prerequisites to the seizure whether the seizure be actual or symbolical.
>
> "The direction to the trust company in the alleged demand to turn over the stock 'in so far and to the extent that the said deposited securities were

> * * * held by, on behalf of, for the benefit of, or for the account of' " (enemies) "was not a determination, for the very things that should have been determined by the Alien Property Custodian were left undetermined, namely that certain specific property was owned by a person or firm who was determined to be an enemy. * * * Of course, a determination that the securities are enemy-owned to the extent that they are enemy-owned is merely going around a circle, and is no determination at all."

There the Custodian had left it to the Trust Company to determine "on presentation of the certificates whether or not they were owned by an enemy". As to that, the District Judge added (178):

> "If there was any determination, it would fall upon the trust company, and that would be a delegation of the power by the Alien Property Custodian, which he had no right to delegate."

Here the attempted delegation of power to make the determination whether the "Antoinetta" was enemy-owned, was to the courts, not a trust company. But, it seems plain that such delegation of power was quite as much beyond the Custodian's authority in the one case as in the other.

If it be said that the Custodian here could make no determination without extinguishing the Government's claim of title by forfeiture, that is but one good reason why he should not have tried to capture for enemy ownership what was already claimed as forfeited for crime; not a valid reason for his attempting an exercise of power never conferred on him by law.

THIRD POINT

Even if petitioner was without any property interest in the "Antoinetta" after the alleged capture, he nevertheless did still possess a defensible interest in the outcome of the litigation, and to deny him, as did the lower courts, the right to continue to defend that interest against the libel was a denial of the due process guaranteed him by the law.

The first and second points *supra* have undertaken to expose the essential fallacy of what constituted the minor premise of the lower courts' reasoning, viz., that the District Court *could validly* determine *without a trial* and *had validly* so determined that petitioner had no title to defend (*supra,* 49, 63).

The third point now addresses itself to the task of showing also fallacious the major premise of that judicial reasoning, viz., that petitioner's right to maintain his defense of title against the libellant's asserted forfeiture title did not survive a valid determination that he had no title to defend (*supra,* 49, 52, 63).

To have been sound, that major premise should have been limited to the event of a valid determination, (1) that petitioner had no title to defend at and since a time prior to the "Antoinetta's" seizure for forfeiture; and (2) that, whenever his title had been lost, such loss had carried with it a loss of every benefit that, by reason of such past ownership, would otherwise inure to him through defeat of the asserted forfeiture title.

a

Petitioner's ownership of the "Antoinetta" though past, entitled him to defend against the libel.

If the seizure of the "Antoinetta" was tortious, and he at the time thereof was owner of the vessel, it was his property right that was invaded, and it was he that was entitled to seek redress therefor against the tort-feasor, the Collector. That interest was not an interest in the vessel, not a right *in rem,* but a personal right inuring to him against the offender; and, therefore, was not a right of the kind the Custodian purported to capture.

But nowhere could it be determined that the seizure was or was not tortious, save in the trial of the asserted forfeiture title. For

> "that decree" (in the forfeiture suit) "can alone decide, whether the taking be rightful or tortious."
>
> *Gelston* v. *Hoyt,* 3 Wheat. 246, 314.

> "The first question is, whether there was a justifiable cause of seizure? This question has been already decided in the proceedings *in rem* (forfeiture suit), "and the decree of acquittal not having been appealed from with effect, is conclusive evidence in every inquiry before every other tribunal, that there was no such cause. This point was decided upon great consideration, in the case of *Gelston* v. *Hoyt* (3 Wheat. 246), and is not believed to be susceptible of any legal doubt."
>
> *The Apollon,* 9 Wheat. 362, 367.

If the final decree in the forfeiture suit against the "Antoinetta" dismisses the libel and the District Court enters no certificate of cause (R. S. 970, *supra,* 30 n.), the right of petitioner to maintain his action against the

Collector for an unlawful seizure will thereby be conclusively secured; otherwise, conclusively lost. As this Court said in *Gelston* v. *Hoyt, supra,* 314:

> "if the action be commenced after a decree of condemnation, or after an acquittal, and there be a certificate of reasonable cause of seizure, then, in the former case, by the general law, and in the latter case, by the special enactment of the statute of the 25th of April 1810, ch. 64, sec. 1, the decree and certificate are each good bars to the action. But if there be a decree of acquittal, and a denial of such certificate, then the seizure is established conclusively to be tortious, and the party is entitled to his full damages for the injury."

Hence it is, that in a forfeiture suit it is the owner as of time of seizure that is entitled to defend, even in preference to a successor in interest for valuable consideration (*United States* v. *422 Casks of Wine,* 1 Pet. 547, 549-550). The former's only means of avoiding loss lies in defeat of that suit; the latter still has his warranty of title to rely upon.

The rule thus applicable here is, in result, not different from that observable in equity, where, as Story says: If the assignment *pendente lite* be disputed, the alleged assignor is *always* a necessary party (Story's Equity Pleading, 10th Ed., 160-161); whereas, even though such assignment be not challenged, the assignee *pendente lite* is *never* a necessary party (*id.,* 163).

The District Court thought *United States* v. *422 Casks of Wine, supra,* not controlling as an authority, because this Court there, after considering and deciding the point discussed *supra,* had gone on to point out that, in any event, the successor in interest *pendente lite* in that case was not objecting to defense by the owner of the *res* as

of time of seizure, and that such want of objection was enough to overcome that of the libellant (R. 50a-51a). In so thinking, the District Court erred. The decision of one considered point raised by the record and presented in argument does not become mere dictum by the subsequent revelation of another point whose decision in itself alone would have been sufficient to dispose of the controversy (*Railroad Companies* v. *Schutte*, 103 U. S. 118, 143; *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. 160, 166; *United States* v. *Title Ins. Co.*, 265 U. S. 472, 486).

b

Petitioner's interest in preserving the trusteeship of the Government for the benefit of his American creditors, entitled him to defend against the libel.

If the libel be defeated, then by virtue of section 9(a) of the Trading with the Enemy Act (*supra*, 11 n.), even though the alleged capture of petitioner's property, on July 22, 1942, be deemed valid, the Government remains the trustee thereof for the benefit of petitioner's American creditors (*White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 301; *Markham* v. *Cabell* [U. S. Sup. Ct.], Adv. Op. No. 76, December 14, 1945); and from their claims, to the extent so satisfied, petitioner becomes forever free.

But, if the libel prevail, the benefit of that trusteeship is lost, and petitioner's American creditors must look for satisfaction of their claims to him and his European assets.

His liability over, thus dependent on the fate of the property he at least once owned, clothes petitioner with a right of defense that is unassailable (*The Beaconsfield*, 158 U. S. 303, 307; *Pendleton* v. *Benner Line*, 246 U. S. 353, 356; *The Kaiser Wilhelm II* [C.C.A. 3rd Cir.],

246 Fed. 786, 789; *Queenan* v. *Mays* [C.C.A. 10th Cir.], 90 F. 2d 525, 534-535; *Chipman* v. *City of Hartford*, 21 Conn. 488, 498); and particularly so when his would-be substitute is or may be possessed of an interest to lose, not win, the defense (*The Regina del Mare*, Br. & L. 315, 316; *Ward* v. *Brandt*, IX Mart. [La.] O. S. 625, 630-631).

In *The Regina del Mare, supra*, Dr. Lushington permitted a vessel's underwriters, rather than her owners, to defend a vessel in an *in rem* action in admiralty for breach of a contract of carriage whose performance had been prevented by accident at sea. He did so, because, as was claimed, if the defense failed the owners would gain an indisputable right to the abandonment to underwriters they theretofore had been unsuccessfully seeking to effect, and were, therefore, interested in losing the suit, whereas the underwriters for the same reason were interested in winning it. Counsel for underwriters argued (315-316):

> "The affidavits show that the insurance companies have an interest to defend this suit, and that the owners have an interest not to defend it. Justice seems to require that these insurers should be admitted to defend. If they are not allowed to come in and protect their interest, the Court may practically lend its assistance to the accomplishment of a fraud."

In sustaining that contention, Dr. Lushington observed that, while by the ancient practice of the Court of Admiralty the owners alone had the right to defend,

> "it was always in the power of the Court to accommodate the practice to the justice of the case."

Here it cannot be gainsaid that the Custodian has good reason for wishing to lose the defense whose conduct he

seeks alone to assume. If it be lost, the Government, whose agent he is, can never be charged with the duty of holding petitioner's property in trusteeship for the benefit of his American and other non-enemy creditors, but would receive and hold that property without any accompanying obligation whatever.

The situation obtaining here is in all essential respects like that passed upon in *Ward* v. *Brandt, supra,* where, on appeal from an order obtained by certain creditors for a forced surrender and sequestration of the assets of a firm of merchants in allegedly failing circumstances, it was shown, with the consent of all parties, that in the meantime other creditors had procured the appointment of syndics who by Louisiana law had thereby succeeded to all of appellants' assets and who by reason of that fact now sought an order substituting them for appellants and permitting them thus to conduct the appeal they were desirous of losing. The Court, in denying that motion, said (630-631):

> "It would be incorrect, I think, to hold, that a case which we are bound to presume the defendants are obstinately disputing below, should, during the pendency of it, be used as a means to prevent them resisting a similar attempt here; and nothing but the most positive law could justify the Court permitting persons to be made parties, who have an interest to lose the suit, they wish to be allowed to carry on."

Those considerations are at least equally apposite here; and for its complete disregard thereof, if for nothing else, the decree affirmed below calls for this Court's disapprobation and reversal.

FOURTH POINT

The loss of the District Court's jurisdiction, if any, over the forfeiture suit, that must inevitably follow the alleged captor's substitution as claimant in place of Petitioner, is sufficient in itself to condemn that substitution.

The Custodian, to the whole extent of his capacity to act as such, is but the Government itself (*Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603; *Becker Co.* v. *Cummings*, 296 U. S. 74, 78; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 118). Hence, to substitute him in place of petitioner as claimant to defend against the libel, is but to permit libellant to defend against, as well as to prosecute, its own libel—to conduct both sides of one and the same litigation.

But, since there can be no judicial controversy in the absence of adverse interests, such substitution, as soon as made, must wholly destroy the District Court's jurisdiction over the forfeiture suit, at least insofar as it concerns the property interest defended by the Custodian (*Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 66 U. S. 419; *Wood-Paper Co.* v. *Heft*, 8 Wall. 333; *Globe & Rutgers Fire Ins. Co.* v. *Hines* [C.C.A., 2d Cir.], 273 Fed. 774, 777, 778).

The petition demanding that relief was, therefore, nothing in effect but a motion for an order destroying the District Court's own jurisdictional power over the controversy; a motion that the Court not merely do a vain act, but an act disentitling it to act at all. And that was in itself sufficient to condemn the petition and the order granting it (*Phelps* v. *Oaks*, 117 U. S. 236, 240; *Drake* v. *Goodridge*, 6 Blatchf. 151, 7 Fed. Cas. 1050, Case

No. 4062; *Hirshfeld* v. *Bopp,* 5 App. Div. [N. Y.] 202). Rule 19 [b] of the Federal Rules of Civil Procedure but recognizes and declares the general rule.

The Circuit Court of Appeals, however, felt that the decree destroyed the jurisdictional power of the District Court over the cause only insofar as it concerned the general owner's interest in the *res;* that it did not destroy that Court's power to decree forfeit the lien interest of any third person therein; and that, therefore, it was within the Court's province to grant it (R.). That conclusion is a *non-sequitur,* even were the premise a sound one. Retention of jurisdictional power over one controversy cannot logically justify a Court's destroying its jurisdictional power over another.

Moreover the premise is not sound. The Act of June 15, 1917, Title II, sec. 3 (*supra,* 4 n.), relied on as authorizing the forfeiture, required the forfeiture of the ship, not of particular interests therein; and least of all of only those third-person interests therein which were presumably innocent.

To decree the forfeiture of those interests in the *res* and not of the general owner's interest therein, would be in effect nothing less than to grant a remission of the penalty against the only interest charged with an offense, and thus to violate the Act of June 17, 1930, c. 497, Title IV, secs. 616-618 (*supra,* 32 n.), forbidding such remission save by the Secretary of the Treasury after finding the absence of the very criminality that the libel charged and that the Court must find in order to decree forfeit the interests of the third-party lienors.

In depriving the District Court of jurisdiction to decree forfeiture of petitioner's interest in the *res,* the decree affirmed below deprived it of jurisdiction to decree the forfeiture of any interests therein.

FIFTH POINT

The District Court never did acquire jurisdiction over the cause of forfeiture; and, if it did, lost the same on libellant's availing itself of the remedy of requisition under the Idle Foreign Vessels Act, and removing the *res* from the District Court's custody and control.

a

The District Court never did acquire jurisdiction over the forfeiture cause.

To have acquired such it was at best necessary that the libel allege a statute authorizing a forfeiture (*United States* v. *Hudson,* 7 Cranch 32, 33; *Brown* v. *United States,* 8 Cranch 110, 123; *United States* v. *Charles D. Kaier Co.* [C.C.A. 3rd Cir.], 61 F. 2d 160, 162) and the offence made the ground of that forfeiture by that or some other statute (*The Samuel,* 1 Wheat. 9).

1. The libel here alleged neither. For it alleged, as the statute authorizing the forfeiture, sec. 3 of the Act of June 15, 1917 (*supra,* 4 n.), which was without force or effect at the pertinent time (*Marchese* v. *United States* [C.C.A. 5th Cir.], 126 F. 2d 671, 673; *Giugni* v. *United States* [C.C.A. 1st Cir.], 127 F. 2d 786, 789; *Scaleggeri* v. *United States* [C.C.A. 3rd Cir.], 126 F. 2d 1023; *Polonio* v. *United States* [C.C.A. 9th Cir.], 131 F. 2d 679, 681.

> "Section 3 of Title II penalizes the wilful causing or permitting by an owner, master or member of a

> crew of a vessel, foreign or domestic, of the injury or destruction of the vessel, or permitting its use for named purposes; but the preceding and following sections show that Title II is applicable only after a proclamation of national emergency, and no proclamation is alleged or had in fact been made in March, 1941, except as the proclamation of limited emergency of September 8, 1939, 54 Stat. 2643, and the enlargement of it on June 27, 1940, 54 Stat. 2711, put into some effect Sec. 1 of Title II.* Section 4, 50 U. S. C. A. sec. 194 declares that the President may employ the land and naval forces to carry out the purpose of the Title, indicating that emergency pervades the whole Title. Therfore the whole of Title II was properly placed in Title 50 of the United States Code Annotated, along with our other war legislation, rather than in Title 18, where ordinary crimes are treated."

Marchese v. *United States, supra,* 673.

The Circuit Court of Appeals below had once so held in *Scaleggeri* v. *United States, supra,* in adopting the "reasoning" and the "conclusions" of the Fifth Circuit Court in *Marchese* v. *United States, supra.* But here it reversed the position it had thus previously assumed and chose to follow a District Court decision to the contrary (*United States* v. *The Pietro Campanella,* 44 F. Supp. 348, 351-352).

In thus reversing its former position it held (1) that the operation of section 3 was not confined to time of war or similar emergency; and (2) that, if it was, it had been brought into effect by the emergencies declared by the

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* The part of this sentence starting with the word "except" appears as a footnote in the opinion.

President in the Executive Orders No. 2352* and No. 2412† of September 8, 1939 (4 F. R. 3851), and June 28, 1940 (5 F. R. 2419) respectively (R.).

But an examination of the statute and the orders referred to shows that reasoning to be unsustainable. For, as to the first ground, section 4 of Title II of the Act of June 15, 1917 (*supra*, 4 n.), provides that

> "The President may employ such part of the land and naval forces of the United States as he may deem necessary to carry out the purpose of this chapter."

And it is scarcely conceivable that Congress should have conferred upon the President the power to employ the army and navy in the enforcement of a criminal law

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* Executive Order, No. 2352, of Sept. 8, 1939, proclaimed, as here pertinent, reads as follows:

"Whereas measures required at this time call for the exercise of only a *limited* number of the powers granted in a national emergency:

Now, therefore, I * * * do proclaim that a national emergency exists in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States and the strengthening of our national defense *within the limits of peace-time authorizations. Specific directions will be given from time to time for carrying out these two purposes.*" (Emphasis supplied.)

† Executive Order, No. 2412, of June 28, 1940, after referring to Executice Order, No. 2352 of September 8, 1939, *supra*, and declaring that the "continuation" of the conditions therein described now called for additional measures "within the limits of peace-time authorizations,"—and after referring alone to, and *quoting* alone sec. 1 of Title II of the Act of June 15, 1917 (40 Stat. 220),—continued as follows:

"And, whereas, It is essential, in order to carry into effect the provisions of said Act *which are quoted herein*, that the powers conferred *therein* upon the President, the Secretary of the Treasury and the Governor of the Panama Canal be at this time exercised, with respect to foreign and domestic vessels.

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, by virtue of the powers conferred upon me by the provisions of the said Act of Congress quoted herein, do hereby declare the *continuation* of the conditions set forth in my proclamation of September 8, 1939, and the existence of a national emergency by reason of threatened disturbance of the international relations of the United States.

"And, I therefore *consent* to the *exercise*, with respect to foreign and domestic vessels *by the Secretary of the Treasury* and the Governor of the Panama Canal, of all the powers conferred by the provisions of said Act." (Emphasis supplied.)

effective in time of peace (*Marchese* v. *United States, supra*).

And, as to the second ground, viz., that the Executive Orders of September 8, 1939, *supra,* and June 28, 1940, *supra,* had brought section 3 into operative force and effect, an examination of those orders shows that they were expressly confined to other purposes and other provisions of the statute. Executive Order No. 2352, expressing a need "for the exercise of only a limited number" of emergency powers "within the limits of peace-time authorizations", was avowedly but a general recognition of the existence of emergency in connection with the maintenance of neutrality and the strengthening of national defense, coupled with a promise that "specific directions" as to particular steps to be taken to meet such emergency would, in the future, be "given from time to time".

And Executive Order No. 2412 but constituted the first of the "specific directions" so promised, viz., that the President consented to the exercise by the Secretary of the Treasury, "within the limits of peace-time authorizations", of the powers conditionally conferred upon him by sec. 1 of Title II of the Act of June 15, 1917 (*supra,* 3 n.). The only powers conferred upon the Secretary of the Treasury by Title II, were those set forth in its section 1. And the only penalties provided by Title II for interference with the exercise of those powers, were those described in its section 2 (*supra,* 3 n.).

Thus Executive Order No. 2412 gave a specific direction for the exercise by the Secretary of the Treasury of the powers enumerated in section 1; and that impliedly invoked the penalties for interference therewith, as provided by section 2. But the order nowhere either expressly or by implication referred to or called into operative force or

effect the sanctions of section 3, with whose enforcement the powers of the Secretary of the Treasury defined in section 1 had nothing whatever to do. On the contrary, the order made operative only the provisions "which are quoted herein"; and the provisions of sec. 1 only were quoted, not those of sec. 3.

The lower courts, in ruling to the contrary and making the provisions of sec. 3 operative, were in effect usurping the functions of the President and themselves giving an *ex post facto* "specific direction" as to section 3 that he at the time had neither deemed necessary nor given.

2. But if section 3 had been in operative force at the time mentioned in the libel, viz., March 30, 1941, it still would confer no jurisdictional power upon the District Court to decree the forfeiture of the "Antoinetta," unless the libel charged her with the offence the statute made a ground of forfeiture. That, the libel did not purport to do.

It is true that the libel charged her owner, officers and crew with having wilfully caused or permitted her destruction or injury and with having knowingly *permitted* her to be used as a place of resort for persons conspiring or preparing to commit offences against the United States and in violation of the rights and obligations of the United States under the law of nations and in fraud of the United States. But neither such causing or permitting her destruction or injury nor such permitting her to be so used, was by the statute made a ground of forfeiture. They did, it is true, subject those who were guilty thereof to personal penalties of fine and imprisonment; but they did not subject the vessel herself to forfeiture.

The statute was very explicit on that point. After making it unlawful to cause or permit the prohibited destruction or injury or to permit the prohibited use, the statute added that

> "in case such vessels shall be so used, * * * the vessel * * * shall be subject to seizure and forfeiture to the United States * * *."

That *actual use* of the vessel in the manner prohibited by the statute was the only forfeitable offence defined by the statute. And that offence, the libel did not charge.

The Circuit Court of Appeals, nevertheless, construed the libel as charging a forfeitable offense. It said (R.):

> "The libels are in the words of the applicable statute and clearly allege that the owner, master or other person in charge or command of the vessel *wilfully caused or permitted the destruction of the vessel and knowingly permitted the vessel to be used as a place of resort* for persons conspiring or preparing to commit offenses against the United States. This sufficiently pleads a cause of forfeiture. *The Samuel,* 1 Wheat. 9." (Emphasis supplied.)

If to cause or permit the vessel's destruction or injury or to permit her to be used in a certain manner necessarily imports her actual use in that manner, the Court was right; not otherwise. For, as this Court said in *The Samuel, supra* (15), the offense, to be properly described in the libel, must

> "be described in the words of the law, and be so described, that if the allegation be true, the case must be within the statute."

And it seems too plain for argument that if the allegation that the owner, officers and crew

> "wilfully caused or permitted the destruction of the vessel and knowingly permitted her to be used as a place of resort for persons, conspiring to commit offenses against the United States"

should be true, it would still be far from stating a "case that must be within the statute." For destruction and injury are in no event such *use* as makes the vessel forfeitable under the statute; and it is not the *permission* to make such use, but such *actual* use that constitutes a case within the statute.

b

Even if the District Court did originally acquire jurisdiction over the forfeiture cause, it lost the same when libellant availed itself of the remedy of requisition and removed the "Antoinetta" from the Court's custody and control.

The Idle Foreign Vessels Act of June 6, 1941, conferred on the Government a new remedy theretofore unavailable under the municipal law or under the law of nations. The power of requisitioning neutral ships, when being proceeded against for condemnation as prize of war, had been previously exercised *in war-time;* but even then only in recognition and observance of the strict necessity of first substituting therefor in the admiralty forum their appraised value in cash or a stipulation therefor (*The Memphis* (D.C. S.D. N.Y.), Blatchf. Pr. Cas. 202, 203-204, 16 Fed. Cas. 1340, 1341, Case No. 9,412; *The Ella Warley* (D.C. S.D. N.Y.), Blatchf. Pr. Cas. 204, 205-206, 8 Fed. Cas. 504, Case No. 4,370; *The Stephen Hart* (D.C. S.D. N.Y.), Blatchf. Pr. Cas. 387, 391, 392, 22 Fed. Cas. 1253, 1255, 1256, Case No. 13,364, aff'd 3 Wall. 559; *The Peterhoff* (D.C. S.D. N.Y.), Blatchf. Pr. Cas. 463, 550, 19 Fed. Cas. 316, 356, Case No. 11,024, aff'd in part and rev'd in part, 5 Wall. 28; *The Zamora,* [P. C.], [1916] 2 A.C. 77, 98-103, reversing the Admiralty Court).

Where a statute gives a new and unusual remedy and defines the terms and conditions on which the right thereto

may be enjoyed, those terms and conditions must be strictly observed (*French* v. *Edwards,* 13 Wall. 506, 511; *Campbellsville Lumber Co.* v. *Hubbert* [C.C.A. 6th Cir.], 112 Fed. 718, 724-725, aff'd 191 U. S. 70; *Andover and Medford Turnpike Corp.* v. *Gould,* 6 Mass. 40, 44; *Monk* v. *Jenkins,* 2 Hill's Eq. (S. C.) 9, 12; *Sutherland, Statutory Construction* [3rd ed., 1943, Horack], Vol. 2, pp. 216-217, sec. 2803).

The terms and conditions of the Idle Foreign Vessels Act (*supra,* 6 n.) were that the vessels taken thereunder must be foreign merchantmen; that just compensation "shall be determined and made" for their use; that at the end of such use they "shall be restored" and "in a condition at least as good as when taken less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition"; and that their use shall be governed by "a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States" and the owners.

Hence, the Executive Department of the Government, if it chose to gain possession of the "Antoinetta" by grace of the new power thus bestowed, had to acknowledge the foreign title, had to enter into a charter under that title, had to pay charter-hire to the foreign owner and had to restore the vessel to him at the conclusion of the charter or pay just compensation in lieu thereof.

It could not stipulate new terms and conditions of its own, such as making its obligation to pay dependent upon the outcome of pending litigation. It had its choice of continuing to pursue its judicial remedy on the theory the vessel already belonged to it; or of requisitioning, on the theory it didn't. The former course would involve delay and doubt; the latter afford immediate use and possession. It chose the latter. And by that choice it must

be bound. Its forfeiture cause was abandoned and necessarily abandoned, when that choice was made.

If the requisition did not in itself destroy the jurisdiction of the District Court over the forfeiture cause, the removal of the *res* pursuant to the requisition did. For the preservation of the *in rem* jurisdiction required the Court's continued custody and control of the *res*. This for two reasons, viz.: (1) The inherent nature of the *in rem* jurisdiction; (2) the positive command of Congress (Act of June 17, 1930, sec. 605, *supra*, 36 n.).

The second is too plain to require more than the reference to the statute requiring the vessel to *remain* in the Collector's possession *throughout* the forfeiture suit.

As to the first, this Court, in denouncing the idea that either one of the parties should be able to gain possession of the *res* and remove it from the admiralty court's custody without depositing security in its place, said by Marshall, C. J., in *Jennings* v. *Carson*, 4 Cranch 2, 23-24:

> "It would be repugnant to the principles of justice, and to the practice of courts, to leave the thing in possession of either of the parties, without security, while the contest is depending. If the practice of a court of admiralty should not place the thing in the custody of its officers, it would be essential to justice, that security should be demanded of the libellant, to have it forthcoming to answer the order of the Court.
>
> "* * * and the court conceives the necessary result of proceedings *in rem* to be, that the thing in litigation must be placed in the custody of the law, and cannot be delivered to either party, but on sufficient security."

That essential characteristic of the *in rem* jurisdiction has continued to command the respect and observance of admiralty courts in this country from *Jennings* v. *Carson* until the decisions below (*The Brig Ann,* 9 Cranch 289, 290, 291; *Cooper* v. *Reynolds,* 10 Wall. 308, 317; *Miller* v. *United States,* 11 Wall. 268, 294; *The Rio Grande,* 23 Wall. 458, 463, 465; *United States* v. *Mack,* 295 U. S. 480, 484).

Below, the Circuit Court of Appeals, while professing respect for and observance of that principle, yet pursued a course of reasoning that emasculated it. For it held in effect that while the vessel, in libellant's possession, was roaming the seven seas, in ports of foreign sovereigns or in ports where martial law prevailed, the vessel was still "in the custody of the courts" (R.). And for this doctrine it cited *Ex parte Whitney Steamboat Co.,* 249 U. S. 115 and two District Court decisions, viz., *The Villarperosa* (D.C. E.D. N.Y.), 43 F. Supp. 140, and *The San Leonardo* (D.C. E.D. N.Y.), 51 F. Supp. 107.

Just consideration of the first of those three cases will show that it supports no such doctrine. The requisition of the vessel there involved was but a *pro forma* requisition "without dispossessing the marshal or his deputy" (117) and "did not *in fact* take her out of the custody of the court." She was apparently at all times within the territorial limits of the District as was disclosed in her owner's unsuccessful suit for requisition hire (*Acme Operating Corp.* v. *United States,* 74 Ct. Cl. 82, 87, 93, 95-96, 97, 98-99, 100, 105, rev'd in 288 U. S. 243). The only party attacking the jurisdiction was in default and without a "standing in court" and the only parties that did have a "standing in court" had consented to the *pro forma* requisition.

The two District Court cases, *The Villarperosa, supra* and *The San Leonardo, supra,* are not persuasive because they both rested on the same misconstruction of the holding in *Ex parte Whitney Steamboat Co., supra,* pointed out above, and upon two other cases quite as obviously not in point, viz., *The Rio Grande, supra,* and *The Little Charles,* 1 Brock. 347, 26 Fed. Cas., p. 979, Case No. 15,612: The first not in point, because a case of unlawful removal of the *res;* nor the second, because a case of the *res'* being replaced by a stipulation for value.

The Circuit Court of Appeals, in ruling that the "Antoinetta" was not removed "from the custody of the courts" was undertaking to repeal by judicial decision the Idle Foreign Vessels Act itself as amended by sec. 3(c) of the Act of March 24, 1943 (*supra,* 27 n.), which specifically provides that when a vessel, whose use and possession is requisitioned or taken under the Act of June 6, 1941 (*supra,* 6 n.),

> "is in the custody of any court, State or Federal, it shall be the duty of all agents and officers of the Court having possession, custody, or control of said vessel, forthwith upon the filing with the clerk of said court of a certified copy of the order of requisitioning or taking, and *without further order of the Court,* to comply with said requisitioning or taking and to permit the representatives of the United States Maritime Commission or the War Shipping Administration, as the case may be, *to take possession, custody, and control of said vessel.*" (Emphasis supplied.)

Surely, if words mean anything, those quoted above must mean that when a vessel in litigation is taken and used in requisition service under the Act of June 6, 1941, the courts lose every last vestige of custody and control

over her, and the Maritime Commission or the War Shipping Administration acquires it. And it was not within the province of the lower courts to disregard or deny the effect of that provision in an attempt to sustain their jurisdiction. Cf. *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 579.

While that amendment of the Idle Foreign Vessels Act had not yet been made when the "Antoinetta" was requisitioned and taken over, it nevertheless would clearly govern her status from and after the time when it did take effect, and at least remove her as of that time from any such chimerical custody and control of the courts as that which was assumed below.

But that alleged continued custody and control of the "Antoinetta" was not the only ground on which the Circuit Court of Appeals sought to sustain the District Court's jurisdiction. Another was that that Court had gained a substitute *res* for the vessel in the shape of the just compensation provided for by the statute, and claimed that as well to be within the court's custody and control. It said (R.):

> "The Act of June 6, 1941, provides that compensation for the use of requisitioned vessels shall be deposited with the Treasurer of the United States. This fund is, therefore, a substitute *res* and the courts' jurisdiction and dominion were extended to it. This is a sufficient answer to the claimants' assertion that *in rem* jurisdiction was lost by the requisitioning of the ships."

But here again the Court disregarded and denied effect to the express language of the Act of June 6, 1941. For that Act, so far from making the deposit with the Treasurer a substitute *res* to take the place of the vessel *in* the action from which she was taken, expressly provided that third-party lienors, including *attachment* lienors and holders of

stipulations for value, might proceed against the fund *not* in the action in which they had effected their attachment or procured their stipulation for value, but only in *new* actions.* See *Johnson* v. *Fleet Corp.,* 280 U. S. 320, 326.

And, as to the *owner* of any such vessel so taken from the Court where it is being proceeded against, the Act, so far from conferring jurisdiction upon the Court *in that action* to treat the fund as a substitute *res* and decree payment thereof to the owner *in that action,* specifically provides that he must commence a *new* action therefor in the Court of Claims under the Tucker Act (*supra,* 7 n.). For, in its first proviso, it commands (*supra,* 6 n.)

> "That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended."

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* The second Proviso of that Act, as amended, reads as follows:

"*Provided further,* That such compensation hereunder, or advances on account thereof, shall be deposited with the Treasurer of the United States, and the fund so deposited shall be available for the payment of such compensation, and shall be subject to be applied to the payment of the amount of any valid claim by way of mortgage or maritime lien or *attachment lien* upon such vessel, or of any *stipulation therefor* in a court of the United States, or of any State, subsisting at the time of such requisition or taking of title or possession; the holder of any *such* claim may commence prior to June 30, 1943, or within six months after the first such deposit with the Treasurer and publication of notice thereof in the Federal Register, whichever date is later, and maintain in the United States District Court from whose custody such vessel has been or may be taken or in whose territorial jurisdiction the vessel was lying at the time of requisition or taking of title or possession, a suit in admiralty according to the principles of libels *in rem* against the fund, which shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties, and any decree in said suit shall be paid out of the first and all subsequent deposits of compensation; and such suit shall be commenced in the manner provided by section 2 of the Suits in Admiralty Act and service of process shall be made in the manner therein provided by service upon the United States Attorney and by mailing by registered mail to the Attorney General and the United States Maritime Commission and due notice shall under order of the court be given to all interested persons, and any decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction." (Emphasis supplied.)

And, sub-section (d) of said section 902 of the latter Act, as thus incorporated in the former, confines the owner's judicial remedy for the recovery of such compensation to a suit in the Court of Claims under the Tucker Act or (when claiming less than $10,000) to a suit in the appropriate District Court (*supra,* 7 n.).

Indeed, to remove all doubt on the point that the owner should have *no* right to proceed, even as third-party lienors have in a *new* action in admiralty against the deposit made with the Treasurer, a new paragraph was added at the end of said sub-section (d) of section 902, by sub-section (d) of section 3 of the Act of March 24, 1943, c. 26 (57 Stat. 49),*—which amended the Act of

* Section 3(d) of this Act reads as follows:

"(d) Section 902 of the Merchant Marine Act, 1936, as amended, is hereby amended by adding at the end of sub-section (d) thereof a paragraph to read as follows:

'The existence of any valid claim by way of mortgage or maritime claim or attachment lien upon such vessel shall not prevent the taking thereof pursuant to this section: Provided, however, that in the event any such claim exists the United States Maritime Commission may in its discretion deposit such portion of the compensation hereunder, or advances on account thereof, *as may equal but not exceed* the amount of *such* claims in respect of the vessel, with the Treasurer of the United States, and the fund so deposited shall be available for the payment of such compensation, and shall be subject to be applied to the payment of the amount of any valid claim by way of mortgage or maritime lien or attachment lien upon such vessel, or of any stipulation therefor in a court of the United States, or of any state, subsisting at the time of such requisition or taking of title or possession; the holder of any such claim may commence prior to June 30, 1943, or within six months after the first such deposit with the Treasurer and publication of notice thereof in the Federal Register, whichever date is later, and maintain in the United States District Court from whose custody such vessel has been or may be taken or in whose territorial jurisdiction the vessel was lying at the time of requisitioning or taking of title or possession, a suit in admiralty according to the principles of libels *in rem* against the fund, which shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties, and any decree in said suit shall be paid out of the first and all subsequent deposits of compensation; and such suit shall be commenced in the manner provided by section 2 of the Suit in Admiralty Act and service of process shall be made in the manner therein provided by service upon the United States attorney and by mailing by registered mail to the Attorney General and the United States Maritime Commission and due notice shall under order of the Court be given to all interested persons, and any decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction.'" (Emphasis supplied.)

June 6, 1941,—expressly prohibiting the Maritime Commission from depositing with the Treasurer a greater amount of compensation than *just enough to satisfy the claims of third-party lienors.* It limited the Commission to depositing

> "such portion of the compensation hereunder, or advances on account thereof, *as may equal but not exceed* the amount of *such* claims in respect of the vessel * * *"

When, therefore, the Circuit Court of Appeals premised that there *would* at *some* time be—it did not say there *is now*—a deposit in the Treasury of the United States which it might treat as a substitute *res* in place of the vessel, and which it might in *this* action pay over to petitioner when and if he should be otherwise entitled to the return of his vessel, it was saying what under the terms of Congressional command could not possibly be true.

It was the Court, not the Congress, that was undertaking to declare the compensation earnings or proceeds a substitute for the *res* in the forfeiture action; which was wholly beyond its power not only for the reasons set out *supra,* but also for the jurisdictional impossibility of decreeing forfeiture against the proceeds of the offending thing instead of the thing itself (*The Motor Vessel, K-22845* [C.C.A. 2d Cir.], 55 F. 2d 671, 672).

The Act of June 6, 1941, as amended, professed to and did, insofar as it lawfully could, destroy the jurisdiction of the Admiralty Courts to proceed further in those *in rem* vessel cases during whose pendency the vessels were requisitioned and taken over by the Maritime Commission under the provisions of that Act.

When, therefore, libellant, availing itself of the remedy provided by that Act, requisitioned and took over from

the District Court possession, custody and control of the *res*, the *in rem* jurisdiction of that Court over the forfeiture cause necessarily came to an end.

CONCLUSION

The petition for writs of certiorari should be granted to the end that the proceedings had below may here be reviewed and the decrees there entered reversed.

Respectfully submitted,

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